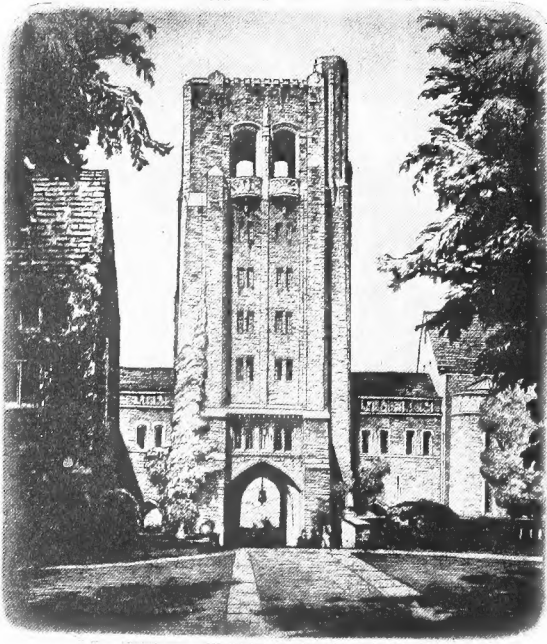




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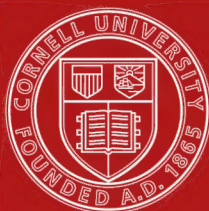
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THE
PRINCIPLES
OF THE
LAW OF EVIDENCE;
WITH
ELEMENTARY RULES
FOR CONDUCTING
THE EXAMINATION AND CROSS-EXAMINATION
OF
WITNESSES.

William Andrus
BY W. M. BEST, A.M., LL.B.,
OF GRAY'S INN, ESQ., BARRISTER AT LAW.

"Principiis, Causis, et Elementis ignoratis, Scientia de quâ ipsa sunt, penitus ignoratur."
Fortescue de Laud. Leg. Angl. c. 8.

IN TWO VOLUMES.

VOL. II.

FIRST AMERICAN, FROM THE SIXTH LONDON, EDITION.

WITH NOTES AND REFERENCES TO AMERICAN CASES

BY H. G. WOOD,
COUNSELOR AT LAW.

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THE
PRINCIPLES OF EVIDENCE,

&c., &c.

VOLUME II.

SECTION II.

PRESUMPTIONS OF LAW AND FACT USUALLY MET IN
PRACTICE.

Design of this section.

§ 335. It is proposed in this section to consider the principal presumptions of law and fact usually met with in practice, and which will be treated in the following order:—

1. Presumption against ignorance of the law.
2. Presumptions derived from the course of nature.
3. Presumptions against misconduct.
4. Presumptions in favor of the validity of acts.
5. Presumptions from possession and user.
6. Presumptions from the ordinary conduct of mankind, the habits of society, and the usages of trade.
- *7. Presumption of the continuance of things in the state in which they have once existed. [* 452]

8. Presumptions in disfavor of a spoliator.
9. Presumptions in international law.
10. Presumptions in maritime law.
11. Miscellaneous presumptions.

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PRESUMPTION AGAINST IGNORANCE OF THE LAW.

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Presumption against ignorance of the law — Generally.

§ 336. The law presumes *conclusively* against ignorance of its provisions. It is a *præsumptio juris et de jure*, that all persons subject to any law which has been duly promulgated, or which derives its efficacy from general or immemorial custom, must, for the reasons stated in the Introduction to this work,¹ be supposed to be acquainted with its provisions, so far as to render them amenable to punishment for their violation, and to have done all acts with a knowledge of their legal effects and consequences² — “Ignorantia juris, quod quisque tenetur scire, non excusat.”³

Courts of justice — The Sovereign.

§ 337. Courts of justice are also presumed to know the law, but in a different sense. Private individuals are only taken to know it sufficiently for their personal

¹ Part 2, § 45.

² Dr. & Stud. Dial. 1, c. 26; Dial. 2, cc. 16, 46; Plowd. 342-3; 1 Co. 177 b; 2 Co. 3 b; 6 Co. 54 a; 2 Dougl. 471; 2 East, 472; 3 M. & Selw. 378.

³ 4 Blackst. Comm. 27.

guidance; but tribunals are to be deemed acquainted *with it so as to be able to administer justice [* 453] when called on;¹ for which reason it is not necessary, in pleading, to state matter of law.² The Sovereign is also presumed to be acquainted with the law — “Præsumitur rex habere omnia jura in scrinio pectoris sui;”³ still it is competent, in certain cases, to show that grants from the crown have been made under a mistake of the law.⁴

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PRESUMPTIONS DERIVED FROM THE COURSE OF NATURE.

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Presumptions derived from the course of nature—Physical.

§ 338. Presumptions derived from the course of nature have been already noticed as in general entitled to more weight than such presumptions as arise casually,⁵ “Naturæ vis maxima,”⁶ and they may be divided into physical and

¹ See the judgment of Maule, J., in *Martindale v. Falkner*, 2 C. B. 719, 720; and the argument of the Att.-Gen. in *Stockdale v. Hansard*, 9 A. & E. 1, 131.

² Steph. Plead. 383, 5th Ed.; 1 Chit. Plead. 216, 6th Ed.

³ Co. Litt. 99 a.

⁴ Plowd. 502; 2 Blackst. Comm. 348; *R. v. Clarke*, 1 Freem. 172. See *Legat's case*, 10 Co. 109.

⁵ *Suprà*, sect. 1, sub-sect. 3, § 334.

⁶ 2 Inst. 564; Plowd. 309.

[* 454] moral. As instances of the first, the *law notices the course of the heavenly bodies, the changes of the seasons, and other physical phenomena, according to the maxim "*lex spectat naturæ ordinem.*"¹ "If," says Littleton,² "the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist; if such tenant dieth in winter, then the lord cannot distrain for his relief, until the time that roses by the course of the year may have their growth." So the law presumes all individuals to be possessed of the usual powers and faculties of the human race; such as common understanding, the power of procreation within the usual ages,³ &c.; for which reason idiocy, lunacy, &c., are never presumed. And the usual incapacities of infancy are not overlooked. It is a *præsumptio juris et de jure* that children under the age of seven years are incapable of committing felony;⁴ that males under fourteen are incapable of sexual intercourse;⁵ and that males under fourteen years, and females under twelve, cannot consent to marriage.⁶ So, between the ages of seven and fourteen, an infant is presumed incapable of committing felony; but this is only *præsumptio juris*;

¹ Co. Litt. 92 a, 197 b.

² Sect. 129.

³ Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17. In the case of gifts in tail, the tenant is presumed never too old to be capable of having issue to inherit by force of the gift. Phill. & Am. Ev. 462. See also *Reynolds v. Reynolds*, 1 Dick. 374, and *Leng v. Hodges*, 1 Jac. 585. Several instances are given in Beck's Med. Jurisp. 148, 7th Ed., of females having borne children above the ages of fifty, and even sixty, years; and see the celebrated *Douglas case*, given by him at page 402. Under the feudal system, if a guardian in chivalry married the heir to a woman past the age of childbearing, it was deemed by law a disparagement. Litt. sect 109; Co. Litt. 80 b.

⁴ 1 Hale, P. C. 27; 4 Blackst. Comm. 23.

⁵ 1 Hale, P. C. 630; *R. v. Phillips*, 8 C. & P. 736; *R. v. Jordan*, 9 Id. 118; *R. v. Brimilow*, Id. 336; *R. v. Groombridge*, 7 C. & P. 582.

⁶ 1 Blackst. Comm. 436.

and a malicious discretion in the accused may be proved, in which case it is said "*malitia supplet ætatem*."¹

Gestation of the human fœtus—Maximum term of.

*§ 339. Under this head come the important and difficult questions of the maximum and [* 455] minimum term of gestation of the human fœtus—questions replete with importance and delicacy, and an erroneous decision on which may not only compromise the rights of individuals, but destroy female honor, and jeopardize the peace of families. These are medico-legal subjects, on which, where we are not tied up by any positive rule of law, the opinions of physiologists and physicians must necessarily have great weight. As to the *maximum* term of gestation—according to Sir Edward Coke, the "*legitimum tempus appointed by law at the furthest* is nine months, or forty weeks;" for which he cites an old case of Robert Radwell, in the reign of Edward I.,² and endeavors to fortify his position by a passage from the Book of Esdras.³ But this doctrine is not clear even upon the ancient authorities,⁴ while it is denied by the modern,⁵ and is contrary to experience. According to many eminent authorities, the usual period of gestation is nine *calendar* months;⁶ but others fix it at ten *lunar* months, being 280 days, or nine *calendar*

¹ 1 Hale, P. C. 26; 4 Blackst. Comm. 23.

² Co. Litt. 123 b.

³ 2 Esdras, iv. 40, 41. "Go thy way to a woman with child, and ask of her, when she hath fulfilled her nine months, if her womb may keep the birth any longer within her. Then said I, 'No, Lord, that can she not.'"

⁴ See them collected and ably commented on by Mr. Hargrave, in his edition of Co. Litt. 123 b, n. (2).

⁵ Runnington on Ejectment, 383 *et seq.*

⁶ Harg. Co. Litt. 123 b, n. (2); Chitty's Med. Jurisp. 405.

months and *about* a week over.¹ Another says that “according to the testimony of experienced accoucheurs, the average duration of gestation in the human female is comprised between the thirty-eighth and fortieth weeks after conception.”² It is, however, conceded [* 456] *on all hands that a delay or difference in the time may take place, of a few days, or perhaps even weeks; as there are numerous causes, both physical and moral, by which delivery may be accelerated or retarded. But whether the laws of nature admit of such a phenomenon, as the protraction of the term of gestation for a considerable number of weeks or months beyond the accustomed period, is an unsettled point.³ It is incontestable that there are to be found on record a great many cases, true or false, of gestation protracted considerably beyond the usual time. There are old instances of children declared legitimate by foreign tribunals after a gestation, real or alleged, of ten, eleven, twelve, thirteen and fourteen months, and even longer.⁴ Upon the whole we may fairly conclude that, admitting the possibility of gestation being protracted in the sense in which the word is here used, the *genuine* cases of it are rare.⁵

¹ Beck's Med. Jurisp. 356, 7th Ed.; who remarks that it is very important to recollect the distinction between *lunar* and *calendar* months. Nine *calendar* months may be from 273 days to 275 days, but ten *lunar* months are 280 days.

² Tayl. Med. Jurisp. 606-7, 7th Ed.

³ Beck's Med. Jurisp. chap. 9, 7th Ed.; Chitty, Med. Jurisp. 405, 406; Tayl. Med. Jurisp. 525, c. 54, 7th Ed.

⁴ See a large number collected in Beck's Med. Jurisp. 362-76, 7th Ed., as well as in other authors who have written on the subject.

⁵ It is difficult to withhold assent from the following observations of a French writer:—"If we admit all the facts reported by ancient and modern authors of delivery from eleven to twenty-three months, it will be very commodious for females; and if so great a latitude is allowed for the production of posthumous heirs, the collateral ones may in all cases abandon their hopes unless sterility be actually present." (Louis, *Mémoire contre*

It is, perhaps, hardly necessary to observe that, in all investigations of this nature, the character and conduct of the mother are elements of the highest importance to be taken into consideration, as also are the characters of the deposing witnesses, and the motives to falsehood or fabrication which may exist on either side.

Minimum term of.

§ 340. With respect to the *minimum* term of gestation—it seems now conceded that, as a general rule, no infant can be born capable of living until 150 days, *or five months, after conception.¹ There are, [* 457] it is true, some old cases recorded to the contrary,² but they have been doubted.³ It seems, also, conceded that children born before seven months are very unlikely to live, and that even at seven months the chance is against the child.⁴

Moral — From feelings and emotions of the human heart.

§ 341. We now proceed to the consideration of presumptions of this kind derived from observation of the *moral* world. Many of these are founded on the feelings and emotions natural to the human heart, of which we have already seen an instance in the celebrated judgment of Solomon.⁵ Following out this principle, it is held that natural love and affection form a *good* consideration, sufficient to support all instruments where a *valu-*

Légitimité des Naissances prétendues tardives, as cited in Beck's Med. Jurisp. 366, 7th Ed.)

¹ Beck's Med. Jurisp. 210, 7th Ed.

² Id., and Chitty's Med. Jurisp. 406.

³ Beck, Med. Jurisp. 210, 7th Ed.

⁴ Id., 212; Tayl. Med. Jurisp. 615 *et seq.*, 7th Ed.

⁵ 1 Kings, iii, 16.

able consideration is not expressly required by law ;¹ that money advanced by a parent to his child is intended as a gift, not as a loan,² &c. And it is a maxim of law “Nemo præsumitur alienam posteritatem suæ prætulisse.”³

Presumption from transferring money.

§ 342. The civil law laid down as a maxim, “Qui solvit, nunquam ita resupinus est, ut facile suas pecunias jactet, et indebitas effundat ;”⁴ and, in the common law, the fact of transferring money to another person is pre-
[* 458] sumptive evidence of payment of an antecedent debt, and not of a gift or loan.⁵ “Non præsumitur donatio.”⁶

Presumption of benefit — Presumption of willingness to accept a benefit.

§ 343. It was said by Abbott, C. J., in the case of *Townson v. Tickell*,⁷ that, “*primâ facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given ;” and presumptions are sometimes founded on the assumption that a person must be taken to be willing to receive a benefit,⁸

¹ 2 Blackst. Com. 297 ; Dy. 374, pl. 17 ; Plowd. 306, 309 ; Finch, Law, 25.

² *Hick v. Keats*, 4 B. & C. 69, 71, per Bayley, J. “Quæ pater filio emancipato studiorum causâ peregre agenti subministravit, si non credendi animo pater misisse fuerit comprobatus, sed pietate debitâ ductus, in rationem portionis, quæ ex defuncti bonis, ad eundem filium pertinuit, computare æquitas non patitur.” Dig. lib. 10, tit. 2, l. 50. See, also, Mascard. de Prob. Concl. 76.

³ Co. Litt. 373 a ; Wing. Max. 285.

⁴ Dig. lib. 22, tit. 3, l. 25. See, also, Voet. ad Pand. lib. 22, tit. 3, N. 15.

⁵ *Welch v. Seaborn*, 1 Stark. 474 ; *Cary v. Gerish*, 4 Esp. 9 ; *Aubert v. Walsh*, 4 Taunt. 293 ; *Breton v. Cope*, 1 Peake, 31.

⁶ Matth. de Prob. cap. 2, N. 10.

⁷ 3 B. & A. 31, 36.

⁸ *Thompson v. Leach*, 2 Salk. 618 ; also reported 3 Lev. 284 ; 2 Ventr. 198 ; *Thomas v. Cook*, 2 B. & Ald. 119, 121. See Burton, Real Prop. 67, 8th Ed.

Thus, in *Thompson v. Leach*,¹ it was held that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee, whose consent to the act is implied ; for, says the book, “a gift imports a benefit and an assumpsit to take a benefit may well be presumed ; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property, or sealing of a bond to another in his absence should be the obligee’s bond immediately before notice.” In *Smyth v. Wheeler*,² where a lease was assigned to B. and C. on certain trusts, Hale, C. J., said: “This assignment, being of a chattel, is in both the assignees till the disagreement of B., and then is wholly in C.” So it is said that mutual benefit is evidence of an agreement ; as suppose two men front a river, and each of them has land between them and the river, and they cut through each other’s ground for water, and that continues twenty years, in such a case an agreement may be presumed.³

Presumption that a person intends the natural consequences of his acts.

* § 344. It is also a maxim, running through the whole law, that every person must be taken [* 459] to intend the natural consequences of his acts.⁴ The principal applications of this are to be found in criminal cases, as will be shown in a subsequent part of this chapter.⁵

¹ 2 Salk. 618 ; also reported 3 Lev. 284 ; 2 Ventr. 198.

² 2 Keb. 774.

³ Vin. Abr. Ev. Q. A. pl. 8.

⁴ 2 Stark. Ev. 572, 3rd Ed. ; 1 Greenl. Ev. § 18, 7th Ed.

⁵ *Infrà*, sect. 3, sub-sect. 1.

SUB-SECTION III.

PRESUMPTIONS AGAINST MISCONDUCT.

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Presumptions against misconduct.

§ 345. We next proceed to consider the presumptions which the law makes against misconduct.

1. Presumption against illegality.

§ 346. First, then, it is a præsumptio juris, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law — whether malum in se or malum prohibitum¹ — or to have done any act subjecting him to any species of punishment, such, [* 460] for instance, as a contempt of court,² or involving *a penalty, such as loss of dower,³ &c. And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offense, or of dealing with the supposed conduct; but holds in.

¹ Phil. & Am. Ev. 464; 2 Ev. Poth. 332.

² *Scholes v. Hilton*, 10 M. & W. 15, 17.

³ *Sidney v. Sidney*, 3 P. Wms. 276; *Watkins v. Watkins*, 2 Atk. 96; *Clarke v. Periam*, Id. 333.

all proceedings, for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally.¹ It is, therefore, a settled rule in criminal cases, that the accused must be presumed innocent until proved to be guilty, and consequently that the onus of proving every thing essential to the establishment of the charge against him lies on the prosecutor—a maxim founded on the most obvious principles of justice and policy.² It is, however, in general sufficient to prove a *prima facie* case; for, as has been well remarked, “imperfect proofs, from which the accused might clear himself, and does not, become perfect.”³ “In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction.”⁴ (a) Undoubtedly,

¹ *Williams v. The East India Company*, 3 East, 192; *R. v. The Inhabitants of Twynning*, 2 B. & A. 386; *R. v. The Inhabitants of Harborne*, 2 A. & E. 540; *Lapsley v. Grierson*, 1 Ho. Lo. Cas. 498; *Rodwell v. Redge*, 1 C. & P. 220; *Ross v. Hunter*, 4 T. R. 33, 38, per Buller, J.; *Leete v. The Gresham Life Insurance Society*, 15 Jurist, 1161, 1162, per Platt, B.

² *Introd. pt. 2, § 49.* It is related that on one occasion, when the Emperor Julian was sitting to administer justice, a prosecutor, seeing his cause about to fail for want of proof, exclaimed: “*Ecquis, florentissime Cæsar, nocens esse poterit usquam, si negare suffecerit?*” To which the emperor readily rejoined, “*Ecquis innocens, esse poterit, si accusasse sufficeret.*” Ammianus Marcellinus, lib. 18, c. 1.

³ Beccaria, *Dei Delitti et delle Pene*, § 7.

⁴ Per Abbott, C. J., in *R. v. Burdett*, 4 B. & A. 95, 161–2. See, also, per Lord Mansfield in *Blatch v. Archer*, Cowp. 63, 65.

(a) The presumption of innocence is so strong that the burden rests upon the prosecution to prove every element of guilt, even to the extent of proving malice in a case of homicide, where there is nothing in the circumstances

[* 461] * the more serious or improbable the charge the stronger must be the *prima facie* proof; and additional caution is required when the offense is of very

attending the killing to show it, and this must be done to the extent of leaving no reasonable doubt; *Schussler v. State*, 29 Ind. 394; *State v. Vincent*, 24 Iowa, 570; *State v. Ostrander*, 18 id. 435; *People v. Bennett*, 49 N. Y. 137; *State v. Porter*, 34 Iowa, 131; *United States v. Gooding*, 12 Wheat. (U. S.) 460; *Hopper v. State*, 19 Ark. 193; *United States v. Douglass*, 2 Blatchf. (U. S.) 207; *Com. v. Hardiman*, 9 Gray (Mass.), 136; *People v. Thayer*, 1 Park. Cr. (N. Y.) 595; *People v. McWharter*, 4 Barb. (N. Y.) 438; and the burden never shifts upon the respondent, except as to any justification he may set up; *Com. v. Kimball*, 24 Pick. (Mass.) 366; *Com. v. Dana*, 3 Metc. (Mass.) 329; and the setting up of an *alibi* does not change the burden, except as to the *alibi*. *Fife v. Com.*, 29 Penn. St. 429; and in cases where the evidence is purely of a circumstantial character, although so strongly connected with facts as to raise a very strong presumption of guilt, the witnesses should always be persons of unimpeachable character, "for," observed Smith, B., in *King v. Crawley*, cited in McNally's Ev. 577, "it is possible the prisoner may be innocent of the crime. In cases of circumstantial evidence, there is great room for doubt as to the guilt of the prisoner, and it is a principle in law that in every case of *doubt* a jury should lean to the merciful side and acquit."

In further commenting upon the character and force of the legal presumption of innocence, the learned judge further says: "This principle established a great ground of distinction between criminal and civil law. *Every thing*," says he, "*is a doubt* in a civil case, where the jury weigh the evidence, and, having struck a fair balance, decide according to the *weight* of the evidence. This, however, is not the rule in *criminal* cases, for it is an established maxim that the jury are not to weigh the evidence, but in cases of *doubt* to acquit the prisoner." As to the kind of *doubt* that should exist, he says: "This humane principle of law, however, is not to be perverted in order to facilitate the escape of the prisoner. It is not a sufficient ground to acquit that there is a *possibility* that the prisoner may be innocent of the charge, for there would be no end to possibilities. I am sorry to say, but it is the truth of this assertion, that makes the situation of a jury so awful that there is no case where a jury can procure *certainly* from circumstantial evidence, and in every such case the verdict of a jury is on *conjecture*. It would, notwithstanding, be no sufficient reason for acquitting the prisoner that there is a *possibility* of his innocence. To acquit on such grounds would be contradictory to the legal principle of circumstantial evidence, for in all cases dependent upon that class of evidence there is always a *possibility* of innocence. It is right such evidence should go to a jury, and particularly in cases of murder. In cases of inferior personal injuries, there is the direct evidence of the person injured, but in *murder*, which is generally committed in secrecy, there can be no testimony of the injured person; he is completely removed; it is necessary to bring the offender

ancient date, for in such cases the means of defense, particularly by proof of an alibi — when true, the most complete of all answers — are greatly diminished.¹ Although

¹ Wills, Circ. Ev. 148, 3rd Ed. There are several instances of successful prosecution after the lapse of very long time from the commission of the offense. See, in particular, the case of W. A. Horne, who was tried and executed in 1759, for the murder of his child in 1724 (2 Annual Reg. 368); also, that of Joseph Wall, Governor of Goree, who was executed in 1802 for a murder committed in 1782 (28 Ho. St. Tr. 51). In the celebrated case of Eugene Aram, also, there was an interval of about fourteen years between the murder and the trial. (2 Annual Reg. 351).

to justice, and, therefore, circumstantial evidence shall be received. As to *light* presumptions, he says, "there are many circumstances which, when first offered in evidence, only raise a presumption which the law calls light, and considers insufficient to ground a conviction upon. Yet if the appearances so alter, and the facts given in evidence are not accounted for, the presumptions which at first were light will become *violent*, and such as will afford a foundation for a verdict of conviction." As to the weight to be given to the character of the accused in determining the force of presumptions in such cases, he says: "Character is of great weight in every case, and requires especial attention when the charge is grounded on circumstantial evidence; *it creates a greater degree of doubt than when the prosecution is supported by direct evidence.*" In all criminal cases, where the evidence is purely circumstantial, the character of the accused is proper to be considered, and in proportion as his character is shown to be good or bad, and the force of the presumptions of innocence or guilt increased. Indeed, it was said by the court, in *Com. v. Carey*, 2 Brewst. (Penn.) 404, and such seems to be the general doctrine that "evidence of good character may raise the doubt entitling a respondent to an acquittal, and thereby turn the scale in his favor." In all cases, the weight to be given to the evidence of character is to be determined by the jury. But where the jury are satisfied beyond a reasonable doubt of the guilt of the accused, his good character cannot be a ground of acquittal. *State v. McMurphy*, 52 Mo. 251, and in cases of reasonable doubt as to the guilt of the accused, evidence of previous good character is conclusive in his favor. *Kilpatrick v. Com.*, 31 Penn. St. 198. As to the effect when the accused fails to account for suspicious appearances within his power to explain, he says: "Presumption will become serious when the appearances are not accounted for by those in whose power it is to account for them. At the same time, should the jury lay any stress upon appearances *against* the prisoner, they should also lay stress upon those *favorable* to him. I have the authority of the law to say that, though a man charged with a crime should *fly*, that is not conclusive evidence of his guilt. The question is, *whether he fled on account of the charge made against him*, nor even in that case does it follow of necessity that he is *guilty* of the charge, yet

in point of law "Nullum tempus occurrit regi," yet as matter of practice, "Accusator post rationabile tempus non est audiendus, nisi bene de se omissionem excuset." ¹ And the presumption in favor of innocence will not be made, when a stronger presumption is raised against it by evidence or otherwise.²

Construction of ambiguous instruments and acts.

§ 347. It is a branch of this rule, that ambiguous instruments or acts shall, if possible, be construed so as

¹ Moore, 817.

² See *suprà*, sect. 1, sub-sect 3.

it is a circumstance material, unfavorable and suspicious." I have given this much of the charge of the judge, because I regard it as the clearest and best exposition of the rule to be applied in such cases to be found in the books. Too great care cannot be observed by courts in the trial of criminal cases, where the evidence is not direct, in setting forth the rights of the accused, the force and effect of the presumption of innocence, and the duty of the prosecution in order to be entitled to a conviction.

In all cases of felony, the respondent has a right to have the jury instructed that innocence should be presumed until the State has established his guilt beyond a reasonable doubt, and that this presumption in his favor, and the burden upon the State, extends to all the elements material to establish the crime and his connection with it beyond a reasonable doubt, and that the evidence ought to be strong and cogent to warrant a verdict of guilty; *Mooney v. State*, 44 Ala. 15; and that a reasonable doubt is such a fair, rational difficulty as the mind at times experiences in weighing conflicting statements or opposing arguments, rendering the best efforts to arrive at a satisfactory conclusion abortive; *Com. v. Carey*, 2 Brewst. (Penn.) 404; and even where an alibi is attempted to be shown, the accused is not required to establish it beyond a reasonable doubt, but is entitled to the *reasonable doubt* which such evidence raises, in connection with the other proof, even though it is not entirely convincing of itself; *Chappel v. State*, 7 Cold. (Tenn.) 92; nor need insanity be proved beyond a reasonable doubt. If a doubt is created by the evidence, so that the jury cannot say whether the prisoner was sane or insane, he is entitled to an acquittal; *McFarland's Case*, 8 Abb. (N. S.) N. Y. Pr. 57; but it must be proved to the satisfaction of the jury that the prisoner's mental condition was not that of a sane person; *Boswell v. Com.*, 20 Gratt. (Va.) 800; and the prosecution are not bound to establish sanity by a preponderance of proof. *State v. Hundley*, 46 Mo. 414.

to have a lawful meaning.¹ Thus, where a deed or other instrument is susceptible of two constructions, one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former. "In facto quod se habet ad bonum et malum, magis de bono, quàm de malo, lex intendit."²(a) Thus, where tenant in tail makes a lease for life, without saying for whose life, it shall be understood that he meant his own, as that is an estate he may lawfully create: whereas, if he meant it * for [* 462] the life of any one else, he would exceed his power, and previous to the 3 & 4 Will. 4, c. 27, s. 39, would have worked a discontinuance.³ So where A, who had commenced an action against B, to recover a sum of money, agreed with C to suspend the proceedings on payment of a specified sum and the delivery of several promissory notes, C undertaking,—in the event of any

¹ Co. Litt. 42 a & b; Finch, Law, 57.

² Co. Litt. 78 b.

³ Co. Litt. 42 a.

(a) If no meaning can be given to a word in the connection in which it is used in a contract it will be treated as mere surplusage, but the whole instrument will be examined, and a construction given it consistent with the meaning of the parties if possible. *Tucker v. Meeks*, 2 Sweeny (N. Y.), 736. And if a word is used to which different meanings can be given, the jury are at liberty, in getting at what the parties intended by such word, to draw such inferences from the facts proved as their own experience teaches them to be the ordinary concomitants or consequences of the facts proved. *Hirst v. De Comeau*, 1 Sweeny (N. Y.), 590; *Kimball v. Browner*, 47 Mo. 398; *St. Louis Gas Light Co. v. St. Louis*, 46 id. 121; *Goosey v. Goosey*, 48 Miss. 210; *Dent v. No. Am., etc., Co.*, 49 N. Y. 390; *Von Keller v. Schulting*, 50 id. 108; *Green v. Day*, 34 Iowa, 328. When facts of public notoriety will be deemed within contemplation of the parties. *Woodruff v. Woodruff*, 32 N. Y. 53. When a contract is silent as to how work shall be done, law will presume that it was to be well done without any reference to the price to be paid therefor. *Smith v. Nelson*, 33 Iowa, 24.

of the notes being dishonored, and A issuing a *capias* or detainer against B,—either to surrender him to custody, or pay the money due on the notes; it was held that the contract was legal, and must be understood to mean that C was to procure the surrender of B by *lawful* means, as by his consent, and not by any attempt to take him forcibly into custody.¹

2. *Presumption of the discharge of duty.*

§ 348. 2. All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law. Thus, the judgment of courts of competent jurisdiction are presumed to be well founded;² and their records to be correctly made;³ judges and jurors are presumed to do nothing causelessly or maliciously;—“*De fide judicis non recipitur quæstio*,”⁴ “*Quæ in curiâ regis acta sunt, ritè agi præsumuntur*,”⁵—public officers are presumed to do their duty;⁶ a parson is presumed to be always resident on his benefice;⁷ a beneficed clergyman is presumed to have read the articles of the [* 463] “church,” and to have made the declaration required by 13 & 14 Car. 2, c. 4, relative to the uniformity of public prayers,⁸ &c. So, oral evidence

¹ *Lewis v. Davison*, 4 M. & W. 654.

² “*Res judicata pro veritate accipitur*.” Co. Litt. 103 a; Dig. lib. 50, tit. 17, l. 207; Introd. Part 2, § 44.

³ 1 Stark. Ev. 252, 3rd Ed.; *Read v. Jackson*, 1 East, 355; *Earl of Carnarvon v. Villebois*, 13 M. & W. 313.

⁴ Anders, 47, pl. 34; *Sutton v. Johnstone*, 1 T. R. 493, 503; *Fray v. Blackburn*, 3 B. & S. 576, 578, note, and the authorities there referred to.

⁵ Bac. Max. Reg. 17.

⁶ 3 Bulst. 43.

⁷ 3 Stark. Ev. 936, 3rd Ed.; *Simms v. Henderson*, 11 Q. B. 1015.

⁸ Co. Litt. 78 b.

⁹ *Monke v. Butler*, 1 Rol. 83.

¹⁰ *Powell v. Milburn*, 3 Wils. 355.

is not receivable of what the accused or the witnesses said when before the committing magistrate, unless there be positive proof that what they did say was not taken down in writing;¹ for the presumption of law is, that the directions of the statutes in that behalf were obeyed.² So where goods seized for a distress are appraised and sold, according to the provisions of the 2 W. & M. c. 5, s. 2, st. 1, the sale will be presumed to have been for the best price that could be got for them;³ and under the repealed statute, 13 Car. 2, c. 1, s. 12, st. 2, which required all parties filling corporate offices, to take the sacrament according to the rights of the Church of England within a year next before their election, every party filling such an office was presumed to have complied with the statute,⁴ &c.(a)

3. "*Odiosa et inhonesta non sunt in lege præsumenda.*"
Fraud and covin—vice and immorality—presumption of marriage—presumption of legitimacy.

§ 349. 3. It is a principle of law nearly, if not altogether, as universal as the former, that "*Odiosa et inhonesta non sunt in lege præsumenda.*"⁵ In furtherance of this it is a maxim that fraud and covin are never pre-

¹ 2 Ev. Poth. 335-6; *Phillips v. Wimburn*, 4 Car. & P. 273; *Parsons v. Brown*, 3 Car. & K. 295-6.

² See those statutes, *suprà*, bk. 1, pt. 1, § 105.

³ Com. Dig. Distress, D. 8.

⁴ *R. v. Hawkins*, 10 East, 211.

⁵ 10 Co. 56 a.

(a) In a case where the facts present a double aspect, one consistent with honest dealing and the other not, the law will strike the balance in favor of honesty and innocence. *Greenwood v. Lowe*, 7 La. Ann. 197. As that his business is lawful. *Simson v. Moulton*, 3 Cush. (Mass.) 269. That a person renders an honest schedule of his effects under insolvent laws. *Harlett v. Hewlett*, 4 Edw. (N. Y. Ch.) 7.

sumed,¹ even in third parties whose conduct only comes in question collaterally.² So, the law presumes against vice and immorality; and, on this ground, presumes [* 464] strongly in favor of marriage;³(a) *so that cohabitation and reputation are held to be presumptive evidence of marriage;* except in prosecutions for bigamy, and in cases where damages are claimed for adultery under the 20 & 21 Vict. c. 85, s. 33, in each of which proceedings an actual marriage must be proved.⁴ The former of these exceptions seems to rest on the ground, that the accused has the presumption of innocence in his favor; and the latter, partly on the ground that the proceeding is in the nature of a penal one; but chiefly because it might otherwise be turned to a bad purpose, by persons giving the name and character of wife to women to whom they had not been married.

One of the strongest illustrations of this principle (although resting also in some degree on grounds of public policy) is the presumption in favor of the legitimacy of children — “Semper præsumitur pro legitimatione puerorum, et filiatio non potest probari.”⁵ Thus it is a præsumptio juris et de jure, that a child born after wed-

¹ 10 Co. 56 a; Cro. El. 292, pl. 2; Cro. Jac. 451; Cro. Car. 550; *Master v. Miller*, 4 T. R. 320, 333, per Buller, J.

² Per Buller, J., in *Ross v. Hunter*, 4 T. R. 33, 38.

³ *Harrison v. The Burgesses of Southampton*, 4 De G., M. & G. 137; *Harrod v. Harrod*, 1 Kay & J. 4.

⁴ *Doe d. Fleming v. Fleming*, 4 Bing. 266; *Reed v. Passer*, 1 Peake, 233; *Sichel v. Lambert*, 15 C. B., N. S. 781, 787.

⁵ *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Dougl. 171; *Catherwood v. Caslon*, 13 M. & W. 261, 265. This last case is based on *R. v. Mills*, 10 Cl. & F. 534, as to which see the observation of Willes, J., in *R. v. Manwaring*, 1 Dears. & B. 132, 139; and also *Beamish v. Beamish*, 9 Ho. Lo. Cas. 274.

⁶ 5 Co. 98 b. See also Co. Litt. 126 a.

(a) *Hooper v. State*, 19 Ark. 193.

lock, of which the mother was, even visibly, pregnant at the time of the marriage, is the offspring of the husband.¹ So every child born during wedlock, where the married parties are neither *infra núbiles annos*, nor physically disqualified for sexual intercourse, is presumed legitimate;² according to the maxim "*pater est quem nuptiæ demonstrant*,"—a presumption which holds even when the parties are living apart by mutual consent; but not when they are *separated by a sentence pronounced by a court of competent jurisdiction, in which case [* 465] obedience to the sentence of the court will be presumed.³ In very ancient times this presumption of legitimacy was only *præsumptio juris*;⁴ but it was subsequently raised into a conclusive presumption, if the husband was within the four seas at any time during the pregnancy of the wife.⁵ In later times, however, this has been very properly relaxed; and it is now competent to negative the fact of sexual intercourse between the parties during the time when, according to the course of nature, the husband could have been the father of the child.⁶ If, however, the fact of sexual intercourse between the husband and wife within that time has been established to the satisfaction of the tribunal, the presumption cannot be rebutted by proof of adultery, as the law will not in

¹ 1 Rol. Abr. Bastard, B.; Co. Litt. 244 a; 1 Phill. Ev. 473, Note 4, 10th Ed.

² 1 Rol. Abr. Bastard, B.

³ *St. George's v. St. Margaret's*, 1 Salk. 123; *Sidney v. Sidney*, 3 P. Wms. 275.

⁴ 1 Phill. Ev. 462, 10th Ed.

⁵ Co. Litt. 244 a; *R. v. Alberton*, 1 L. Raym. 395-6; *R. v. Murrey*, 1 Salk. 122.

⁶ *Morris v. Davies*, 5 Cl. & F. 163; *R. v. The Inhabitants of Mansfield*, 1 Q. B. 444. And see *Legge v. Edmunds*, 25 L. J., Ch. 125; *Plowes v. Bossey*, 31 Id. 681; *Atchley v. Sprigg*, 33 Id. 345.

that case allow a balance of evidence as to who was most likely to be the father of the child.¹ (a)

¹ *Banbury Peerage case*, 1 Sim. & S. 155; *Head v. Head*, Id. 152; *Morris v. Davies*, 5 Cl. & F. 163; *Case of the Barony of Saye and Sele*, 1 Ho. Lo. Cas. 507; *Wright v. Holdgate*, 3 Car. & K. 158.

(a) Legitimacy is presumed in all cases except when the facts are such as show it impossible that the husband could have had access to the wife within such a time, prior to the birth of the child, so as to be its father in fact. Strong evidence is required to overcome this presumption. *Dinkins v. Samuel*, 10 Rich. (S. C.) 66.

Suspicious or rumors are not sufficient; *Canjolle v. Ferrie*, 26 Barb. (N. Y.) 177; *Strode v. Magowan*, 8 Bush (Ky.), 621; and no proof of marriage is necessary. It is enough that the reputed father lived with the woman as his wife. *Canjolle v. Ferrie*, *ante*; *Strode v. Magowan*, *ante*.

Indeed, the presumption of legitimacy is so strong that if access by the husband to the wife, such as affords an opportunity for sexual intercourse between them within such a period that he might, in the natural course of things, be the father of a child to which she gives birth, the child will be held legitimate, although it is shown that before, at the time of, and subsequent to the period of access, she was having intercourse with another man, and slept with him every night. *Bury v. Phillpot*, 2 Mylne & Keen. 349. Where access is shown, *sexual intercourse* is *primâ facie* to be presumed, and in order to overcome this proof, it must be shown by facts and circumstances that afford an irresistible presumption that it did not take place. *Head v. Head*, 1 Sim. & S. 150. And this rule is strictly adhered to from motives of public policy and the protection of social interests. *Pepys*, Master of the Rolls, in *Bury v. Phillpot*, *ante*.

The rule, in reference to this presumption and the degree of evidence necessary to overcome it, was laid down by the House of Lords in the *Banbury Peerage Case*, 1 Sim. & S. 153, as follows: "In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child."

In that case, the court also held that the presumption of sexual intercourse, resulting from "access," might be rebutted by proof of facts or circumstances that plainly show that it could not have taken place. But when access is once proved, the burden of proving the illegitimacy of a child is upon him who asserts it.

4. *Presumption against wrongful or tortious conduct.*

§ 350. 4. Wrongful or tortious conduct will not be presumed. "Injuria non præsumitur;"¹ "Nullum iniquum est in jure præsumendum."² Thus, no species of ouster, such as disseizin, discontinuance, &c., will be presumed without proof, either direct or presumptive.³ So when a party to any forensic proceeding [* 466] tenders, in support of his case, a document which must be taken, *prima facie*, to be the property of another, the court will presume that he did not come by it in any tortious way.⁴ And where a person, who is beyond the jurisdiction of a court, has in his possession a document required by that court for the purposes of justice, it is not to be presumed that he will withhold it.⁵(a)

¹ Co. Litt. 232 b.

² 4 Co. 72 a.

³ *Doe d. Fishar v. Prosser*, Cowp. 217. See Co. Litt. 42 a & b; *Peaceable d. Hornblower v. Read*, 1 East, 568; *Thomas v. Thomas*, 2 Kay & J. 79.

⁴ Littleton, sect. 375-377.

⁵ *Boyle v. Wiseman*, 10 Exch. 647.

(a) The law, in the absence of proof, always, as between honesty and dishonesty, presumes in favor of the former. *Case v. Case*, 17 Cal. 598; *Greenwood v. Lowe*, 7 La. Ann. 197. Therefore, when fraud is charged, the burden is upon the one asserting it, to establish it by full proof. *Martin v. Drumm*, 12 La. Ann. 494; *Salter v. Lackman*, 39 Mo. 91; *Roberts v. Guernsey*, 3 Grant's Cas. (Penn.) 237; *Wright v. Prescott*, 2 Barb. (N. Y.) 196. So, when one charges another with having tortiously taken goods, the fact must be proved by him. *McEwen v. Portland*, 1 Oregon, 300. The law presuming that he has the title, who has the presumption? *Finch v. Alston*, 2 S. & P. (Ala.) 83; *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Goodwin v. Garr*, 8 Cal. 615; *Vining v. Aker*, 53 Me. 544; *Entreken v. Brown*, 32 Penn. St. 364. But the possession, in order to raise such a presumption, must be consistent with an unqualified ownership. *Calvin v. Warfort*, 20 Md. 357; *Paxton v. Boyce*, 1 Tex. 317. And where there is strong presumptive evidence of frauds, it will outweigh positive proof. *Guyso v. Delaroderic*, 9 La. Ann. 278; *Short v. Staple*, 1 Gall. (U. S.) 104.

5. *Presumption against irreligion.*

§ 351. 5. Want of religious belief, or irreligious conduct, will not be presumed. "All the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God."¹ "Nemo præsumitur esse immemor suæ æternæ salutis, et maximè in articulo mortis;"² and "In his quæ sunt favorabiliora animæ, quamvis sunt damnosa rebus, fiat aliquando extensio statuti."³ It is partly on this principle that the declarations of a person who has met a violent end, made by him when under the conviction of his impending death, are, contrary to the general principle which excludes hearsay testimony, receivable in evidence against a party charged with being the cause of the death.⁴ So, although by the Statute of Marlbridge (52 Hen. III.), c. 6, a feoffment to a relative was deemed a collusive act, intended to deprive the lord of the fee of his wardship, no will of land devisable by custom, or devise of a use, before 34 Hen. 8, c. 5, could be impeached for such collusion,⁵ &c.

6. *Presumption of the truth of testimony.*

§ 352. 6. All testimony given in a court of justice is presumed to be true until the contrary appears.⁶
 [* 467] "La *ley ne veut que on donne faux evidence."⁷

¹ 1 Greenl. Ev. § 42, 7th Ed.

² 6 Co. 76 a.

³ 10 Co. 101 b.

⁴ *Suprà*, bk. 2, pt. 2, and *infra*, ch. 4.

⁵ 2 Inst. 112; 6 Co. 76 a.

⁶ Cro. Jac. 601, pl. 26.

⁷ Per Grevil, M. 20 H. VII, 11 B. pl. 21.

This presumption seems based on four grounds: 1. A reliance on the truth of human testimony in general;¹ 2. That the law will not presume crime,² *i. e.*, perjury; 3. That the law will not presume wrong, *i. e.*, an intention to injure the party whom the evidence affects; and 4. That the law will not presume 'irreligion,'³ and consequently will not presume intentionally false oaths.

SUB-SECTION IV.

PRESUMPTIONS IN FAVOR OF THE VALIDITY OF ACTS.

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Maxims — "*Omnia præsumuntur ritè esse acta,*" &c.

§ 353. The important maxims, "*Omnia præsumuntur ritè esse acta;*"⁴ "*Omnia præsumuntur solenniter esse acta;*"⁵ "*Omnia præsumuntur legitimè facta,*

¹ Introd. pt. 1, §§ 15 *et seq.*

² *Ante*, § 346.

³ *Ante*, § 351.

⁴ 2 Ev. Poth. 335; 1 Phill. Ev. 480, 10th Ed.; 3 B. & C. 327; 7 Id. 790; 18 C. B. 45; 6 E. & B. 973; 13 C. B., N. S. 639.

⁵ 12 Co. 4 & 5.

[* 468] *donec probetur in contrarium,"¹ &c., must not be understood as of universal application.² The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed. The true principle intended to be conveyed by the rule, "*Omnia præsumuntur ritè esse acta*," and the other expressions just quoted, seems to be that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests only on grounds of public policy.

General view of the subject — 1. *Priora à posterioribus* —
2. *Posteriora a prioribus* — 3. *Media ab extremis*.

§ 354. Taking a general view of the subject, the acts or things thus presumed are divisible into three classes. 1. Where, from the existence of posterior acts in a supposed chain of events, the existence of *prior* acts in the chain is inferred or assumed — *priora præsumuntur à posterioribus*³ — as where a prescriptive right or a grant is inferred from modern enjoyment.⁴ 2. Where the

¹ Co. Litt. 232 b; 8 Cl. & F. 144; 10 Cl. & F. 162.

² Many of our legal maxims are expressed with too great a degree of generality: *e. g.*, *Omnia præsumuntur ritè esse acta*; *Omnia præsumuntur contra spoliatorem*; *Omnis innovatio plus novitate perturbat quam utilitate prodest*; *Omnis definitio in lege periculosa*, &c. If definitions are dangerous in law, universal propositions are not less so.

³ 3 Benth. Jud. Ev. 213.

⁴ See *infra*, sub-sect. 5.

existence of *posterior* acts is inferred from that of prior acts — *præsumuntur posteriora à prioribus* — as where the sealing and delivery of a deed purporting to be signed, sealed, and delivered, are inferred on proof of the signing * only.¹ This is manifestly the reverse of the former, and, as a general rule, the presumption [* 469] is much weaker.² 3. Where *intermediate* proceedings are presumed, — “*probatis extremis, præsumuntur media*,”³ — as where livery of seizin is presumed on proof of a feoffment and twenty years’ enjoyment under it;⁴ or where a jury are directed to presume mesne assignments.⁵

Division of the subject.

§ 355. The real nature and extent of this principle will be best understood, by the examination of decided cases in which it has been recognized and acted on by the courts, and of others where it has been held not to apply. With this view it is proposed to consider it with reference, first, to official appointments; secondly, to official acts; thirdly, to judicial acts; fourthly, to extra-judicial acts. The application of this maxim in support of possession and user, especially where there has been long and peaceable enjoyment, will, from its importance, be reserved for separate consideration.⁶

¹ *Infrà*, § 362.

² “The probative force of posterior events, in regard to prior ones, is naturally much stronger than that of prior events with regard to posterior ones. In all human affairs, execution is better evidence of design than design of execution. Why?—Because human designs are so often frustrated.” 3 Benth. Jud. Ev. 213, 215, 216.

³ 1 Greenl. Ev. § 20, 7th Ed.; *White v. Foljambe*, 11 Ves. 337, 350.

⁴ *Doe d. Wilkins v. Marquis of Cleveland*, 9 B. & C. 864; *Rees d. Chamberlain v. Lloyd*, Wightw. 123; *Isack v. Clarke*, 1 Ro. 132; *Doe d. Lewis v. Davies*, 2 M. & W. 503.

⁵ *Earl d. Goodwin v. Baxter*, 2 W. Bl. 1228; *White v. Foljambe*, 11 Ves. 350.

⁶ *Infrà*, sub-sect. 5.

1. *Official appointments.*

§ 356. 1. With respect to official appointments. It is a general principle, that a person's acting in a public capacity is *prima facie* evidence of his having been duly authorized so to do;¹ and even though the office be [* 470] *one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production.² There are numerous instances to be found of the application of this principle. It has been held to apply to justices of the peace,³ church-wardens and overseers,⁴ masters in chancery,⁵ surrogates,⁶ commissioners for taking affidavits,⁷ attorneys,⁸ under-sheriffs,⁹ replevin clerks,¹⁰ peace officers and constables,¹¹ persons in the employment of the Post-Office,¹² vestry clerks,¹³ attested soldiers under the Mutiny Act,¹⁴ &c.; and it has been expressly extended by statute to revenue officers.¹⁵ And it holds in criminal cases as well as in civil. A strong illustration is to be found in *R. v. Wini-*

¹ Ph. & Am. Ev. 452; 1 Phil. Ev. 449, 10th Ed.; *Berryman v. Wise*, 4 T. R. 366; *M'Gahey v. Alston*, 2 M. & W. 206.

² Ph. & Am. Ev. 452-3; 1 Phill. Ev. 449, 10th Ed.

³ *Berryman v. Wise*, 4 T. R. 366.

⁴ *Doe d. Bowley v. Barnes*, 8 Q. B. 1037.

⁵ *Marshall v. Lam*, 5 Q. B. 115.

⁶ *R. v. Verelst*, 3 Camp. 432.

⁷ *R. v. James*, 1 Show. 397; *R. v. Howard*, 1 M. & Rob. 187.

⁸ *Pearce v. Whale*, 5 B. & C. 38.

⁹ *Doe d. James v. Brown*, 5 B. & A. 243.

¹⁰ *Faulkner v. Johnson*, 11 M. & W. 581.

¹¹ *R. v. Gorden*, Leach, C. L. 515; *Berryman v. Wise*, 4 T. R. 366, per Buller, J.

¹² *R. v. Rees*, 6 C. & P. 606.

¹³ *M'Gahey v. Alston*, 2 M. & W. 206.

¹⁴ *Wotton v. Gavin*, 16 Q. B. 48.

¹⁵ 26 Geo. 3, c. 77, s. 12 and c. 82, s. 6; 11 Geo. 1, c. 30, s. 32; 7 & 8 Geo. 4, c. 53, s. 17; 16 & 17 Vict. c. 107, s. 307.

fred and *Thomas Gordon*,¹ who were indicted for the murder of a constable in the execution of his office, and where the allegation in the indictment of his being constable was held sufficiently proved by evidence that he acted and was generally known in the parish as such. Both prisoners were convicted and Thomas Gordon executed, but the female prisoner escaped on another point.

§ 357. This presumption is not restricted to appointments *of a strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act,² and to trustees empowered by act of Parliament to raise money to build a church.³ But it does not, at least in general, hold in the case of private individuals, or agents supposed to be acting by their authority. Thus, it does not apply to an executor or administrator,⁴ or a tithe-collector acting under the authority of a private person,⁵ &c.

§ 358. This presumption of the due appointment of public officers seems to rest on three grounds:⁶ 1st. A principle of public policy. 2ndly. In some degree on the ground that, in many cases, not to make it would be

¹ Leach, C. L. 515, 4th Ed.

² *Butler v. Ford*, 1 Cr. & M. 662.

³ *R. v. Murphy*, 8 C. & P. 310, per Coleridge, J. The acts of Parliament in that case, namely, the 56 Geo. 3, c. xxix, and 1 & 2 Geo. 4, c. xxiv, are stated in the report to be *private* acts, but it appears that they contain clauses declaring them public acts.

⁴ Previous to 15 & 16 Vict. c. 76, s. 55, executors and administrators were bound, in pleading, to make proof of the probate, or letters of administration. 1 Chit. Pl. 420, 6th Ed.

⁵ *Short v. Lee*, 2 Jac. & W. 468.

⁶ Many of the cases in the books rest on a totally distinct ground, namely, that the party against whom the evidence was offered had, by words or acts, admitted the character of the person described as an officer.

to presume the party acting guilty of a breach of the law. 3rdly. That, in the case of public appointments, there are facilities for disproving the regularity of the appointment, which do not exist in the case of the agents of private individuals.

2. *Official acts.*

§ 359. 2. The maxim "*Omnia præsumuntur ritè esse acta*" holds in many cases where acts are required to be done by official persons, or with their concurrence. Thus, the courts will presume in favor of a return to a mandamus;¹ and where a parish certificate, which appeared *to have been signed by only one [* 472] churchwarden, had been allowed by two justices of the peace, a custom was presumed, for the parish to have only one churchwarden.² And Lord Kenyon laid it down, that every thing is to be intended in support of orders of justices, as contradistinguished to convictions.³ This must not, however, be understood to mean that presumptions will be made inconsistent with the manifest probabilities of the case.⁴

3. *Judicial acts.*

§ 360. 3. We next come to the consideration of judicial acts. These, from their very nature, are in general susceptible of more regular proof, so that the maxim "*Omnia præsumuntur ritè esse acta*" has here a much more limited application. "With respect to the general principle of presuming a regularity of pro-

¹ Per Buller, J., in *R. v. Lyme Regis*, 1 Doug. 159.

² *R. v. Catesby*, 2 B. & C. 814. See, also, *R. v. Hinckley*, 12 East, 361, and *R. v. Bestland*, 1 Wils. 128.

³ *R. v. Morris*, 4 T. R. 552. See, also, *R. v. Stockton*, 5 B. & Ad. 546.

⁴ *R. v. Upton Gray*, 10 B. & C. 807.

cedure," says Sir W. D. Evans, "it may, perhaps, appear to be the true conclusion, that wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity. This principle, however, ought not to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists."¹ It is a principle that *irregularity* will not be presumed;² and there are several instances to be found in the books, of the courts dispensing with formal proof of things necessary in strictness to give validity to judicial acts. Thus, a fine was presumed to have been levied with proclamations³ even before 11 & 12 Vict. c. 70; and when a recovery has been suffered by a person [* 473] who had power to do so, the maxim "*Omnia præsumuntur ritè esse acta*" applies, until the contrary appears.⁴ So it is a rule never to raise a presumption for the sake of overturning an award, but, on the contrary, to make every reasonable intendment in its support;⁵ although there are cases in the books which it might be difficult to reconcile with this principle.

Rule does not apply to give jurisdiction.

§ 361. The maxim "*Omnia præsumuntur ritè esse acta*" does not apply to give jurisdiction to magistrates, or other

¹ 2 Ev. Poth. 336.

² Macnam. Null. and Irregul. 42; per Alderson, B., in *Counce v. Rigby*, 3 M. & W. 68; *James v. Heward*, 3 G. & Dav. 264.

³ 3 Co. 86 b.

⁴ 3 Stark. Ev. 961, 3rd Ed.

⁵ Caldwell, Arbitr. 132, 2nd Ed.; Watson, Aw. 175, 176, 3rd Ed.; Russell, Arbitr. 268, 681, 3rd Ed.; 3 Bulst. 66-7.

inferior tribunals.¹ Thus, where a power was given to justices of the peace, under a mutiny act, to take the examination of a soldier quartered at the place where the examination took place, and the examination, when taken, did not show on the face of it that the soldier was quartered at that place, the Court of Queen's Bench held the examination not receivable for the purpose of proving a settlement, unless it were shown by evidence that he was so quartered at the time.²

4. *Extra-judicial acts.*

§ 362. 4. We next proceed to consider the application of this maxim to extra-judicial acts, such as written instruments, and matters in pais. Thus, it is an established rule that deeds, wills, and other attested documents, which are thirty years old or upwards, and are produced from an unsuspected repository, prove themselves, and [* 474] the testimony of the subscribing witness *may be dispensed with, although it is competent to the opposite party to call him to disprove the regularity of the execution.³ And there are many instances of the application of this presumption even where it is strictly necessary to prove the execution of an attested instrument. Thus, where a deed is produced, purporting to have been executed in due form by signing, sealing, and delivery, but the attesting witnesses can only speak to the fact of signing, it may be properly left to the jury to presume a sealing and delivery.⁴ So, where an agreement is

¹ *R. v. Hulcott*, 6 T. R. 583; *R. v. All Saints', Southampton*, 7 B. & C. 785; *Carratt v. Morley*, 1 Q. B. 18; *Dempster v. Purnell*, 4 Scott, N. R. 30; *Anon.*, 1 B. & Ad. 386, note; *R. v. Totness*, 11 Q. B. 80; *R. v. Bloomsbury*, 4 E. & B. 520.

² *R. v. All Saints' Southampton*, 7 B. & C. 785.

³ 2 Phill. Ev. 245 *et seq.*, 10th Ed. Vide *suprà*, bk. 2, pt. 3, chap. 1, §§ 220-1.

⁴ *Burling v. Paterson*, 9 C. & P. 570; *Ball v. Taylor*, 1 C. & P. 417; *Grellier v. Neale*, 1 Peake, 146; *Talbot v. Hodson*, 7 Taunt. 251.

stated to have been reduced to writing, signing will be presumed.'

Execution of wills.

§ 363. The 7 Will. 4 & 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), requires wills to be in writing, and executed with certain formalities; and somewhat similar provisions with reference to wills of real estate were contained in the statute previously in force, the 29 Car. 2, c. 3, s. 5.¹ Under both statutes the courts have, in many instances, applied the maxim "*Omnia præsuntur ritè esse acta*" to the execution of wills; and as a general principle, they lean in favor of a fair will, so as not to defeat it for a slip in form, where the intention of the legislature has been complied with.²

Collateral facts—Construction of instruments.

§ 364. So, collateral facts requisite to give validity to instruments will, in general, be presumed. Thus, where an instrument has been lost, it will be presumed to have * been duly stamped; and where a party refuses to produce a document after notice, it will be [* 475] presumed, at least against him, to have been duly stamped, unless the contrary appears." Where an ejectment was brought on the assignment of a term given by the defendant to secure the payment of an annuity, it was held unnecessary for the plaintiff to prove that the annuity had been enrolled in pursuance of the 17 Geo. 3, c. 26,

¹ *Rist v. Hobson*, 1 Sim. & S. 543.

² *Suprà*, bk. 2, pt. 3, chap. 1, § 222.

³ *Right, Lessee of Cater, v. Price*, 1 Dougl. 241, 243; *Bond v. Seawell*, 3 Burr. 1773; 1 Jarman, Wills, 75 *et seq.*; *In the goods of Huckvale*, L. Rep., 1 P. & D. 375.

⁴ Bk. 2, pt. 3, chap. 1, § 230.

⁵ *Crisp v. Anderson*, 1 Stark. 35.

as, if it were not enrolled, that would more properly come from the other side.¹ This principle has also been extended to the construction of instruments. Thus, where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties;² as, for instance, where property is sought to be conveyed by lease and release, both of which are contained in one deed, a priority of execution of the lease will be presumed.³ So, in construing a deed or will, priority or posteriority in the collocation of words will be disregarded, in order to carry into effect the manifest intention of the parties.⁴

Principle much extended by modern statutes.

§ 365. It only remains to add that the principle in question has been much extended by modern statutes. We have already alluded to this subject when treating of the history of the rise and progress of the English law of evidence.⁵ (a)

¹ *Doe d. Griffin v. Mason*, 3 Camp. 7. See acc. *Doe d. Lewis v. Bingham*, 4 B. & A. 672; and *The Brighton-Railway Company v. Fairclough*, 2 Man. & G. 674.

² *Barker v. Keete*, 1 Freem. 251; *Taylor d. Atkyns v. Horde*, 1 Burr. 106.

³ Per North, C. J., in *Barker v. Keete*, 1 Freem. 251.

⁴ *Brice v. Smith*, Willes, 1, and the cases there cited; *Richards v. Bluck*, 6 C. B. 441.

⁵ Bk. 1, pt. 2, § 118.

(a) The law makes all reasonable presumptions in support of acts done by public officers, whether judicial or executive, and where no proof exists to the contrary, will presume that they have discharged their duties lawfully, and will make all reasonable presumptions to uphold their official acts. Thus, where a person is bound to do a certain act, the omission of which would be a culpable neglect of duty, courts will presume the performance of it, unless the contrary be proved. *Hartwell v. Root*, 19 Johns. (N. Y.) 345. This presumption is predicated upon public policy, and is for the benefit not only of the public officer, but of all who are affected by those acts. *Arent v. Squire*,

1 Daly (C. P. N. Y.), 347. Thus the action of a board of supervisors, in changing the boundaries of a town, is presumed to be regular and according to law, until the contrary is shown; *People v. Carpenter*, 24 N. Y. 86; and where it is the duty of an officer to do an act in a particular manner, as to sell land in parcels, it will be presumed that he complied with the law; *Leland v. Cameron*, 31 N. Y. 115; nor is this presumption overcome by a recital in the deed that the whole premises were bid off for a gross sum, for the sale may have been made in parcels consistently with such a recital. *Id.*

So where a public officer has done an act which, if certain preliminary conditions have not been complied with, is illegal, it will be presumed that such preliminary conditions were complied with; *Jackson v. Cole*, 4 Cow. (N. Y.) 587; *Jackson v. Belknap*, 12 Johns. (N. Y.) 96; *Finlay v. Cook*, 54 Barb. (N. Y.) 9; that a sheriff has duly posted notices of sale. *Wood v. Morehouse*, 45 N. Y. 369.

The return of a sheriff is presumed to be true and cannot be impeached collaterally, but only in direct proceedings to which the sheriff is a party, or when the validity of his acts are directly involved. *Sperling v. Levy*, 1 Daly (N. Y. C. P.), 95; but this presumption is not sufficient to sustain a vital jurisdictional fact. *Sheldon v. Wright*, 7 Barb. (N. Y.) 39.

Where a statute requires that an act shall be done by three officers when the report is only signed by two, it will be presumed that the three were present and consulted about the matter, but this presumption may be met and rebutted by proof. *Doughty v. Hope*, 3 Den. (N. Y.) 249; *Tucker v. Rankin*, 15 Barb. (N. Y.) 471. So where a sheriff sells property on an execution, in the absence of any statement to the contrary, it will be presumed that he made a regular levy; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Hartwell v. Root*, 19 Johns. (N. Y.) 345; *Millspaugh v. Mitchell*, 8 Barb. (N. Y.) 333; *Jackson v. Schaffer*, 11 Johns. (N. Y.) 513; so that he made his levy and sale in the life-time of the execution; *Crane v. Dygert*, 4 Wend. (N. Y.) 675; so, too, it will be presumed that a notary public has done all that the law requires in the presentation of a note to charge indorsers; *Russ v. Bedell*, 5 Duer (N. Y.), 462; and that the time of day at which he presented the note was a proper one; *Burbanks v. Beach*, 15 Barb. (N. Y.) 326; so it will be presumed that a notary public, administering an oath to an affiant, administered the oath in a county in which he had jurisdiction; *Mosher v. Heydick*, 45 Barb. (N. Y.) 549; and that a notice sent by a notary of the dishonor of a bill or note was directed to the person named in his certificate; *Smith v. Jones*, 20 Wend. (N. Y.) 192; so where the law requires the delivery to a person of paper or other thing by a public officer, the law will presume the delivery. *Bowdoin v. Colman*, 6 Duer (N. Y.), 182. So it will be presumed that a trustee has performed his duty in the application of the trust funds. *Matter of Mason*, 4 Edw. (Ch. N. Y.) 418.

A court of inferior jurisdiction will be presumed to have acted correctly upon matters within its jurisdiction; *McGrews v. McGrews*, 1 Stew. & Port. (Ala.) 30; so where a license is granted by a court or board appointed for that purpose, it will be presumed that all the prerequisites required by law were complied with; *Com. v. Bolkom*, 3 Pick. (Mass.) 281; so where the record of

a town fails to show whether an election was by ballot or otherwise, it will be presumed that it was according to law; *Mussey v. White*, 3 Greenl. (Me.) 290; so a survey made and returned to the proper office, and having every appearance of regularity, will be regarded as regular until the contrary is shown. *Harris v. Burchan*, 1 Wash. C. C. (U. S.) 191.

So where a clerk, who is dead, has made entries on his employer's book in the usual course of business, it will be presumed that he delivered the articles charged. *Clarke v. Magruder*, 2 Harr. & J. (Md.) 77. All presumptions are made in favor of the validity of an instrument, unless invalid on its face, and a person attacking its validity must overcome this presumption by proof. *Graham v. O'Fallon*, 4 Mo. 601. And where an instrument provides for the payment of money on a certain day, but the instrument itself is not dated, courts will presume that it was made on a day prior to the day on which the money becomes due: *Clevinger v. Reiar*, W. & S. (Penn.) 486. So where a vessel is seaworthy at the time when a policy is issued, it will be presumed that she continues so until the voyage is ended. *Martin v. Flushing Ins. Co.*, 20 Pick. (Mass.) 389. When a party demurs to a declaration or plea all reasonable presumptions are to be made against the party demurring, and the court is not bound to render judgment in conformity with what the verdict of the jury *should* have been, but with what it *legally could have been*. *Dearing v. Smith*, 4 Ala. 432. And generally on a demurrer, the courts will infer such facts as a jury might have found had the cause been submitted to them; *Cheevning v. Gatewood*, 5 How. (Miss.) 552; thus, where a demand and notice upon indorsers of a promissory note is stated, and that notice was given the same day that the demand was made upon the payor, it will be presumed that the demand and notice were according to law. *Id.* Where a trial is had without a jury, and the record does not show that a jury was demanded, it will be presumed that a jury trial was waived by the parties. *Wilson v. Light*, 4 Pike (Ark.), 158; *Saum v. Jones County*, 1 Iowa, 165. A return made on a writ, by an officer serving the same, is *prima facie* evidence that service was made as therein stated. *Perryman v. The State*, 8 Mo. 208. But when the return itself is defective, it will not be presumed even after the lapse of time that the requirements of the law were complied with. *Bannister v. Higginson*, 3 Shep. (Me.) 73. All public officers are presumed to have done their duty as required by law. *Dollarhide v. Muscatine Co.*, 1 Iowa, 158. As that a constable has complied with the provisions of the law relating to the levy of executions, where there is nothing in his return inconsistent with such a presumption; *Drake v. Mooney*, 31 Vt. 617; that an administrator's sale was regular; *Wyatt v. Scott*, 33 Ala. 313; or that a sale appearing on the record to have been ordered by a judge was regular and valid, and all the requirements of the law as prerequisite to such sale were complied with, although the return does not show it; *Baker v. Coe*, 20 Texas, 313; and that such sale was regularly conducted. *Vincent v. Eaves*, 1 Metc. (Ky.) 247. But the court, notwithstanding the presumption, may in its discretion inquire into the regularity of the sale.

But while an officer's return is presumed to be correct, and he is to be

presumed to have done all that the law required of him; *Webber v. Webber*, 1 Metc. (Ky.) 18; yet it is only *prima facie* evidence of the fact, and may be shown to be otherwise. *Shelbyville v. Shelbyville*, id. 54; *Case v. Colston*, 1 id. 145; *Cobb v. Newcomb*, 7 Clarke (Iowa), 43. Where an officer in levying an execution upon land is required, in the absence of personal notice to the debtor, or of any tenant upon the premises, to post a notice of such levy in a conspicuous place upon the premises, when the return merely states that he "posted a notice upon the premises," it will be presumed that he posted the notice in a conspicuous place, as required by law; *Lewis v. Quinker*, 2 Metc. (Ky.) 284; *Anderson v. Sutton*, 2 Duvall (Ky.), 480. As to presumptions of the regularity of a sheriff's proceedings, see *Bancroft v. Sinclair*, 12 Rich. (S. C.) 617; *Rome v. Table*, etc., 10 Cal. 441; *Tillman v. Davis*, 28 Ga. 494; *Brown v. May*, id. 531; and officers' acts are presumed to be regular, although not set out in detail; *Ritter v. Scannell*, 11 Cal. 238; but the officer's return is not conclusive, and may be shown to be false in collateral proceedings. *Drake v. Mooney*, 31 Vt. 617; but see *Tillman v. Davis*, *ante*, where it is held that an officer's return cannot be attacked except for fraud or collusion. It is presumed that an executor has discharged his duty according to law until the contrary appears. *Lockhardt v. White*, 18 Tex. 102.

Where the court has jurisdiction of the subject-matter of an action, all its proceedings will be presumed to be regular, as well as all preliminary steps necessary to confer jurisdiction over the parties. Thus, where a court of equity had jurisdiction over the subject-matter of the decree, and declared the rights of the parties, when there were infant defendants who were represented by a guardian *ad litem*, it will be presumed, in proceedings collaterally attacking the regularity of the decree, that the defendants were duly served with process, or had notice in some of the modes required by law, so as to give the court jurisdiction, although the record itself is silent upon this point. *Hopper v. Fisher*, 2 Head (Tenn.), 253.

All reasonable intendments are made in favor of the jurisdiction of a court, and it will be presumed, until the contrary is shown. *Rogers v. Odell*, 39 N. H. 452. So where, if charges on a particular point are not requested, the omission to charge in a particular way will be presumed to have been acquiesced in. *Brown v. State*, 28 Ga. 199. So, where there is nothing to make it unreasonable to do so, it will be presumed that the facts proved were sufficient to sustain the judgment in the lower court; *St. Clair v. McGehee*, 22 Tex. 5; *Dibble v. Truluck*, 11 Fla. 135; *Martin v. Bank of Tenn.*, 2 Cold. (Tenn.) 332; as courts of general jurisdiction are presumed to have acted upon the necessary evidence; *Granjary v. Merkle*, 22 Ill. 249; and where the exceptions do not state that they contain *all* the evidence, the presumption will be in favor of the judgment or verdict, even though, upon the evidence reported in the bill of exceptions, the evidence to sustain the judgment is not sufficient. *Warner v. Carlton*, 22 Ill. 415; *Fickling v. Brewer*, 38 Ala. 685; *List v. Kortepeter*, 26 Ind. 27; *Kelly v. Kelly*, 20 Wis. 443; *Dibble v. Truluck*, 11 Fla. 135; *Martin v. Bank*, etc., 2 Cold. (Tenn.) 832; *Sharp v. Johnson*, 22 Ark. 79; *Knight v.*

Sharp, 24 Ark. 602; Jenkins v. Frink, 30 Cal. 586; James v. Williams, 31 id. 211; Henry v. Evarts, 30 id. 425; Buckland v. Goddard, 31 Ill. 206.

All reasonable intendments are made in favor of judgments; hence, where the warrant of attorney and affidavit were not set out in a judgment by confession, the courts will presume that there was one, in the absence of proof to the contrary. Applegate v. Mason, 13 Ind. 75.

But it must be understood that the maxim *omnia rite*, etc., only applies where records and proceedings on their face are apparently regular. If the records or proceedings are on their face irregular, and show an inherent legal defect, the maxim *omnia præsumuntur solemniter esse acta* will not cure the defect. Thus where a record of a judgment on a bond and warrant of attorney did not show any appearance or confession of judgment, it was held that it could not be presumed that any such appearance and confession were made. In order to warrant the application of the maxim, the records and proceedings must be such on their face as not to defeat the presumption and make it absurd. Facts must be stated sufficient to predicate the presumption upon; and, when this is not done, such a presumption would be arbitrary and unwarrantable. Lytle v. Colts, 27 Penn. St. 193.

So where no instructions are asked for on a given point, and those which were given were not excepted to, it is presumed that those given were correct. Conway v. Jefferson, 46 N. H. 521. So where the error charged is the striking out of a plea, and the plea is not set out in the record, in the absence of proof as to what it contained, it will be presumed that it was of such a character as justified its being stricken out by the court. Colton v. Bradley, 38 Ala. 506. But not where there is affirmative proof of error. Parish v. Jones, 23 Ark. 323. So where a contract has been admitted without objection in the lower court to its admission, on account of its not being stamped, the appellate court will presume that when it was admitted, it was properly stamped. Roberts v. Murray, 18 La. Ann. 572.

All reasonable intendments are made in support of the verdict of a jury, the findings of fact by a referee, or by the court itself. Thus where the jury find a certain sum in damages, it will be presumed that they took into consideration all the proper elements in computing the amounts, including interest. McNally v. Shobe, 22 Iowa, 49. So it will be presumed that they followed the instructions of the court to disregard certain evidence, in case they found a particular fact. Ayer v. Hartford Ins. Co., 21 Iowa, 193.

The presumption is always in favor of the regularity of the proceedings of a court of record. Nasler v. Haynes, 2 Nev. 53; Dilley v. Sherman, id. 67; Champion v. Sessions, id. 271.

In making an order for the sale of the property, real or personal, of a deceased person, it will be presumed that the court granting the order adjudged every question necessary to justify the order, and that all preliminary steps, required by law to be taken, were taken, and the facts upon which the order is predicated need not be set forth in the record. Florentine v. Barton, 2 Wall. (U. S.) 210; Monke v. Horne, 38 Miss. 100.

A guardian's sale will be presumed to be regular. Pursley v. Hays, 17

Iowa, 311. So that the person appointed to sell property was duly appointed, and courts will not inquire into the appointment collaterally to impeach the sale. *Eaton v. White*, 18 Wis. 517. So it will be presumed that an administrator's bond was duly approved by the probate court, although the record does not show the fact; if all other steps were taken with strictness and accuracy, and when property is required to be sold by him at public auction, it will be presumed that it was so sold, and that all was done required to be done in order to give the purchaser a legal title. Particularly is this so when the purchaser has been in possession for twenty years. *Austin v. Austin*, 50 Me. 74. So that all legal steps were taken in the appointment of an administrator. *Gray's Adm'rs v. Cruise*, 36 Ala. 559. Also, that city authorities have complied with the law in making contracts. *New Orleans v. Halpin*, 17 La. Ann. 175. As where a highway has been laid out by selectmen, although the record does not show that all the requirements of the statute have been complied with, yet after the lapse of a long time—in this case forty years—it will be presumed that their proceedings were regular. *State v. Alstead*, 18 N. H. 49. So where an execution duly issued has been lost, it will, after the lapse of thirty years, be presumed that it was in due form and contained all the provisions required by statute; *Leland v. Cameron*, 31 N. Y. 115; *McNorton v. Akers*, 24 Iowa, 369. and that the officer selling property under the execution did all that was required by law. But this presumption may be rebutted by proof (*Id.*) that the sheriff served first, the petitions that were filed first. *Buckner v. Bush*, 1 Duvall (Ky.), 394; *Phelps v. Ratcliffe*, 3 Bush (Ky.), 334.

When an execution is placed in a sheriff's hands for collection, and not returned, the presumption is that he has collected the money thereon, and it will be presumed that he collected it on the last day of the life of the execution. *O'Bannan v. Sanders*, 24 Gratt. (Va.) 138. So where the records of a meeting of a corporation show that the meeting was duly called and notices duly served, it will be presumed that a quorum was present at such meeting. *Citizens' Ins. Co. v. Sortwell*, 8 Allen (Mass.), 217. So it will be presumed that the subscribing witnesses to an instrument signed it after the maker had signed it. *Hughes v. Dibnam*, 8 Jones (N. C.), 127. That a justice of the peace acted within his jurisdiction, although the records may be construed to cover a case in which he had no jurisdiction, yet if the presumption of jurisdiction is not excluded by the record, it will be presumed. *Bumpus v. Fisher*, 21 Texas, 561.

If the record of a notice of appeal is indorsed as filed on a certain day, and under this is an indorsement of an admission of service signed the same day, it will be presumed that the notice was filed before it was served. *Wright v. Ross*, 26 Cal. 262.

Where a corporation may lawfully acquire a certain kind of property, it will be presumed that it was lawfully acquired, and one claiming the contrary must so aver and prove the fact to be. *Farmers' Bank v. Detroit, etc., R. R. Co.*, 17 Wis. 372. So, where it is authorized to take a note for any purpose, it will be presumed that a note taken by it was for a lawful purpose. *Howard v. Boorman*, 18 Wis. 517.

Courts of general jurisdiction are presumed to have had jurisdiction over all

matters in reference to which they have exercised it, until the contrary is clearly shown, and every presumption being in favor of jurisdiction, such presumptions must all be overcome by proof. *Butcher v. Bank of Brownsville*, 2 Kan. 70. But no such presumptions are made in favor of courts of special or limited jurisdiction. *Lampert v. Lithgow*, 1 Bush (Ky.), 176.

On an appeal it will be presumed that every material finding of the court below was sustained by competent proof, unless the contrary appears from the record itself. *Dean v. Geeman*, 44 Ill. 286; *Pratt v. Miller*, 2 Kan. 192; *Doll v. Anderson*, 27 Cal. 248; *Ripon v. Joint School Dist.*, 17 Wis. 83; *Edmiston v. Garrison*, 18 id. 594; *West Mass. Ins. Co. v. Duffey*, 2 Kan. 347; *McBride v. Hartwell*, id. 410; *Buckhout v. Swift*, 27 Cal. 433; *Skillen v. Phillips*, 23 Ind. 229; *Wolf v. Goodhue, etc., Ins. Co.*, 43 Barb. (N. Y.) 400; *Landers v. Bolton*, 26 Cal. 393; *Frisbie v. Timan*, 12 Fla. 537; *Carpenter v. Small*, 35 Cal. 346; *Emmal v. Webb*, 36 id. 197. Not only will the courts presume the evidence sufficient, but also competent. *Nisqually Mills Co. v. Taylor*, 1 Wash. Terr. Rep. 3. But it will not be presumed, because no exception was taken to the charge, that the court struck out evidence admitted over objection. *Wood v. Willard*, 36 Vt. 82. Neither will the appellate court presume that a jury was misled by a charge in itself correct. *Heaton v. Ins. Co.*, 7 R. I. 502. Nor by a particular portion of the judge's charge, when the necessary qualifications thereto have been made. *Vosburgh v. Teator*, 32 N. Y. 561.

When the death of a party is suggested on the record and an order entered that his administrator enter, it will be presumed that the order was entered on proper proof of death. *Porter v. Sharpe*, 16 Iowa, 438. So unless an instruction given by the court is manifestly erroneous under any and every conceivable state of facts, it will be presumed to be correct unless it is proved to be incorrect by the party objecting to it, or from the bill of exceptions itself. *People v. King*, 27 Cal. 507; *Heaton v. Ins. Co.*, 7 R. I. 502; *Vosburgh v. Teator*, 32 N. Y. 561.

In the absence of any thing in the record to show that any necessary step was taken to perfect an appeal, or accomplish any other result, the fact that the papers necessary to secure the ends are found in the proper office will not raise a presumption that they were duly filed. The record will be presumed to be correct and to embrace a statement of all that was done in the matter. *Fairchild v. State*, 23 Tex. 176. Where a court may in its discretion hear applications for the discharge of bail, after a bail bond has been forfeited, it will be presumed that its discretion was properly exercised, unless the contrary be shown. *Com. v. Coleman*, 2 Metc. (Ky.) 382. So where the courts are required to certify the age of a person sentenced to a "reform school" or other institution, and the age is material as affecting the regularity of the sentence, it will be presumed that the court arrived at the age of the prisoner from competent evidence, and a court will not assume, on *habeas corpus*, that other than legal evidence was admitted on the question, nor will it inquire whether such was, or was not the fact. *In re Mason*, 8 Mich. 70. Where an order or vote is passed by a corporation, municipal or otherwise, in which a person has had an interest, and the order or vote is subsequently

reconsidered, in an action involving the regularity of such rescission or reconsideration, the jury may presume that the corporation had power to reconsider the vote or order in the absence of proof to the contrary. *Red v. Augusta*, 25 Ga. 286. Where a witness is objected to on the ground of *incompetency*, the record need not show what he would have testified to, as it will be presumed that his evidence is material; but if he is rejected upon the ground of the *irrelevancy* of his evidence, the record must show what he could testify to, as the court will presume in favor of the correctness of his rejection by the lower court, until the contrary is shown. *Fairley v. Fairley*, 34 Miss. 18.

In California it is held that one who sets up a judgment of a justice of the peace must show affirmatively every fact necessary to give jurisdiction. *Swain v. Chase*, 12 Cal. 283. And in Wisconsin it is held that, where a justice has jurisdiction of the subject-matter of the action, it will be presumed that all his proceedings were regular, until the contrary be shown. This, however, is subject to the exception that there is nothing in the record to show irregularity. *Merritt v. Baldwin*, 6 Wis. 439.

The final settlement of the account of an administrator or executor, being necessarily the act and judgment of the court, must be shown by the record, and in the absence of such record *will not* be presumed. *Picatt v. Bates*, 39 Mo. 292.

The presumption is that a criminal was in court when the verdict was returned, and that he was informed of its nature, unless the contrary appears. *Rhodes v. State*, 23 Ind. 24; *State v. Wood*, 17 Iowa, 18.

In the absence of proof it will be presumed, from the administration of an oath and the notarial seal, that a notary of another State has the powers of a notary in the State where it is to be used. *Conolly v. Riley*, 25 Md. 402. And that when the law requires an officer to be sworn, in the absence of proof to the contrary, it will be presumed that he has taken the oath required by law. *Willis v. Lewis*, 28 Tex. 185.

So where the law requires any special duty of an officer, as that highway commissioners should report to the town auditor, it will be presumed that they so reported. *Loedemier v. Aspinwall*, 43 Ill. 401.

So, it will be presumed, when no proof exists to the contrary, that the revenue laws of the country have been complied with by individuals in the execution of a contract. *Smith v. Jordan*, 13 Minn. 364.

The fact that permits are issued by a proper officer to trade in certain insurrectionary districts is evidence that they were properly issued, until the contrary is shown. *United States v. Weed*, 5 Wall. (U. S.) 62. And when an officer of the government assumes to act in the discharge of an official duty it will be presumed that he had the necessary authority to act within its legitimate extent. *Jones v. Muisbach*, 26 Tex. 235. But not when his acts are contrary to the usual and well-known functions and duties of his office. *Id.*

When a clerk of a court issues an execution, it is presumed that he issued it under the direction of some person authorized to direct its issue and control the writ. *Niantic Bank v. Dennis*, 37 Ill. 381.

When a party shows error in the proceedings of a court, it will be presumed that he is prejudiced by it, and if a contrary claim is made, it must be disclosed by the record. *Norwood v. Kenfield*, 30 Cal. 393. An appellate court can consider no questions that are not disclosed in the record, and if these disclose no error, the judgment will always be sustained. *Dimick v. Campbell*, 31 Cal. 238. In considering the rulings of a court on a motion for a nonsuit, the appellate court will treat all the facts as proved which the evidence tended to establish, and which were essential to be proved to entitle the plaintiff to recover. *Daw v. Gould, etc., Co.*, 31 Cal. 629.

Where a decree of an inferior court shows that notice was duly published, this will be held sufficient evidence of the fact of publication in the appellate court, unless it is shown that the fact is positively otherwise by something in the record. *Gilchrist v. Cannon*, 1 Cold. (Tenn.) 581.

Where two deeds are handed into the recording office the same day, it is presumed that they are recorded in the order of time in which they are received. *Brookfield v. Goodrich*, 32 Ill. 363.

Where the statute requires certain steps to be taken before an order of court can be made, it will be presumed, from the fact of the granting of such order, that such steps were taken, even though they are not recited on the order or record; *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; the presumption always being that officers of the law have done their duty; *Kelly v. Green*, 53 Penn. St. 302; and that the business of the court was proceeded with in a proper manner; *Reynolds v. Nelson*, 41 Miss. 83; and that illegal documents, as unstamped instruments, were not received in evidence. *Towne v. Bossier*, 19 La. Ann. 162; *Thayer v. Barney*, 12 Minn. 502.

Where a land scrip could only be located upon lands located in a certain territory, it will be presumed that the lands upon which it was located were within the territory. *Wright v. Hawkins*, 28 Tex. 452. A foreign judgment will be presumed to have been obtained in accordance with the *lex loci*; *Rosenthal v. Renick*, 44 Ill. 202; and where amendments of pleadings become necessary to a valid judgment, it will be presumed that all amendments were made that could be. *Talmie v. Dean*, 1 Wash. Ter. Rep. 57.

Possession long continued under an ancient tax deed, with proper recitals, is evidence from which the regularity of a tax sale and a compliance with the law may be presumed; but no lapse of time, however long, will afford presumptive evidence of the regularity of such sale, where there has been no possession of the premises by the purchaser. *Worthing v. Webster*, 45 Me. 270. Where, however, a patent for school lands has issued, and certain preliminary steps were prerequisite to its issue, in the absence of fraud it will be presumed that all the necessary steps were taken. *Trustees v. Allen*, 31 Ill. 120.

A man's consent may be conclusively presumed from long silence, or a failure to take measures to assert a right, when such silence or failure affects the rights of others. Thus, where a husband conveyed property to his wife with power in her to dispose of it by will, and the wife died leaving a will conveying the property, it was held, after the proving and allowance of the will, without objection by the husband, that his consent to the disposition of the

property by the wife, must be conclusively presumed. *Churchill v. Corker*, 25 Ga. 479.

Where title to land is made under an administrator's deed by order of court, and it appears by the record that no notice was served upon the heirs as required by law, it will be presumed that such heirs voluntarily appeared, the record showing nothing to the contrary, and that the title is regular and good. *Gerrard v. Johnson*, 12 Ind. 636.

Where an order of sale is required before property can be sold, it must affirmatively appear that such an order was obtained; and it will not be presumed from a commission to sell, even though the commission recites the fact that such an order was made, and that the commission is in pursuance of it; *Robert v. Brown*, 14 La. Ann. 597; in such cases the record must affirmatively show that a proper case for a sale existed, and that all the necessary steps were taken to obtain the order, as notice to the heirs, and the reasons for the sale, as parol evidence, cannot supply such defects; but when the record shows the necessary jurisdictional facts, the same presumptions attach as exist in favor of judgments of courts of original jurisdiction. *Gregory v. McPherson*, 13 Cal. 562.

Where a person subscribes his name to a document, or permits another to do so, the law presumes that he knew its contents. *Clem v. N. & L. R. R. Co.*, 9 Ind. 488; *Harris v. Story*, 2 E. D. S. (N. Y.) 363.

Where the law requires that only a certain number of officers shall be chosen by a municipal corporation, it will be presumed that only that number were chosen; as where the statute provided that three selectmen should be chosen, it was held that it would be presumed that that number were chosen at a regular election. *Jay v. Carthage*, 48 Me. 353; so it will be presumed that the officers of a municipal corporation, in all their public acts, comply with the requirements of the law, and act within the scope of their legal powers. Thus, in a case where a contractor brought an action for the price of a sidewalk made by him in front of the defendant's premises in pursuance of a contract entered into with the city authorities of New Orleans, the defendant moved for a nonsuit, because the plaintiff had not proved that the petition for the paving of the sidewalk had been signed by one-fourth of the property-holders, or the notices published as required by law; but the court held that in the absence of proof, it would be presumed that the requisite legal steps had been taken, and that, if the defendant would avail himself of such defects, he must prove them. *Webber v. Gottschalk*, 15 La. Ann. 376; but this rule is subject to exceptions, it seems, in instances where their acts under a statute operate to divest a citizen of his title to property. In such cases, it is held that the purchaser of such property, under a sale in pursuance of such power, must show that all the requisite preliminary steps to give validity to the act were complied with. *Keane v. Cannovan*, 21 Cal. 291.

But where property is sold upon legal process, as a writ of execution, by a sheriff or other proper officer, the law presumes in favor of the purchaser that all the legal steps requisite to make the sale a legal and valid one were taken unless the officer's return and the record of his doings show the contrary

Mercer v. Doe, 6 Ind. 80. So where the rights of infant heirs are affected by proceedings, and the record shows that a guardian *ad litem* was appointed by the court, the courts will presume, in proceedings affecting the validity of such proceedings, that the infants were regularly brought before the court. *Breckenridge v. Dawson*, 7 Ind. 383. So letters of guardianship, regular on their face and issued by a court of competent jurisdiction, will be presumed to have been legally issued. *Den v. Gaston*, 1 Dutch. (N. J.) 615.

The acts of inferior courts of limited and special jurisdiction are only strictly scrutinized so far as the question of jurisdiction is concerned; when that is established, and it appears that they had the power to do the acts in question, the same presumptions are made in their favor as are made in favor of courts of general jurisdiction. *State v. Hinchman*, 27 Penn. St. 193. So where it is shown that in a foreclosure suit the mortgagor confessed judgment and assented to the issue of execution to sell the property, and that the property was sold on the execution, which was acquiesced in by the mortgagor for twenty years, it was held, on proof that the docket of the court had been lost, that it would be presumed that the judgment was properly entered on the docket, by the clerk. *Slicer v. Bank of Pittsburgh*, 16 How. (U. S.) 571. It must be borne in mind, however, that the principle *omnia ritè* only applies in favor of the acts of courts or public officers where jurisdiction is properly vested. *Markham v. Boyd*, 22 Gratt. (Va.) 544; *Buchanan v. King*, id. 414; *Pittsburgh v. Walter*, 69 Penn. St. 365; *Allen v. Sowerly*, 37 Md. 416; *Hicks v. Haywood*, 4 Heisk. (Tenn.) 598.

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* SUB-SECTION V.

PRESUMPTIONS FROM POSSESSION AND USER.

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Presumption of right from possession, &c., highly favored in jurisprudence—Possession, &c., prima facie evidence of property—Presumption strengthened by length of enjoyment.

§ 366. The presumption of right in a party who is in the possession of property, or of that quasi possession of which rights only occasionally exercisable are susceptible, is highly favored in every system of jurisprudence, and seems to rest partly on principles of natural justice, and partly on public policy. By the law of England, possession, or quasi possession, as the case may be, is

¹ Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16; Dig. lib. 50, tit. 17, ll. 126 & 128; Cod. lib. 4, tit. 19, l. 2; Sext. Decret. lib. 5, tit. 12, De Reg. Jur., Reg. 65; Co. Litt. 6 b.

prima facie evidence of property,¹—“Melior (potior) est conditio possidentis;”² and the possession of real estate, or the perception of the rents and profits from the person in possession, is prima facie evidence of the highest estate in that property, namely, a seizin in fee.³ But the strength of the presumption, arising from possession of any kind, is materially increased by the length of the time of enjoyment, and the absence of interruption or disturbance from others who, supposing it illegal, were interested in putting an end to it. In favor of such continued and peaceable enjoyment, the courts have gone great lengths in presuming not only a legal origin for it, [* 478] but many collateral facts, *to render complete the title of the possessor, according to the maxim “Ex diuturnitate temporis, omnia præsumuntur solenniter esse acta”⁴ (a).

Division of the subject.

§ 367. In treating this important subject, it is proposed to consider, 1st. The presumption from long user of prescriptive and other rights to things which lie in grant, both at common law, and as affected by the statutes 2 & 3 Will. 4, cc. 71 and 100. 2ndly. Incorporeal rights not

¹ Ph. & Am. Ev. 472; 1 Ph. Ev. 484, 10th Ed.; 4 Taunt. 547; 2 Wms. Saund. 47 f, 6th Ed.

² 2 Inst. 391; 4 Id. 180; Plowd. 296; Hob. 103, 199; Vaugh. 60; 1 T. R. 153; 4 Id. 564.

³ B. N. P. 103; *Jeyne v. Price*, 5 Taunt. 326; *Denn d. Tarzwell v. Barnard*, Cowp. 595; *Crease v. Barrett*, 1 C. M. & R. 931; *R. v. Overseers of Birmingham*, 1 B. & S. 763, 768, 770; *Metters v. Brown*, 1 H. & C. 686, 692.

⁴ Co. Litt. 6 b; Jenk. Cent. 4, Cas. 77; Palm. 427. This maxim is clearly a case where *priora præsumuntur à posterioribus*. See *suprà*, sub-sect. 4, § 354.

(a) The use and enjoyment of premises, even though exclusive and adversary for the period of twenty years, is not conclusive evidence of right, but *presumptive* merely; and it is competent to show that such use and enjoyment has not been acquiesced in. *Field v. Brown*, 24 Gratt. (Va.) 96.

affected by those statutes. 3rdly. Presumptions of facts in support of beneficial enjoyment.

Presumption from long user of rights to certain things which lie in grant — Prescription.

§ 368. Among the various ways in which a title to property can be acquired, most systems of jurisprudence recognize that of "prescription," or undisturbed possession or user for a period of time, longer or shorter as fixed by law.¹ "Præscriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis."² According to the common law of England, this species of title cannot be made to land or corporeal hereditaments,³ or to such incorporeal rights as must arise by matter of record,⁴ and it is in general restricted to things which may be created by grant,⁵ such as rights of common, easements, franchises which can be created by grant without record, &c. The reason for this is said to be, that every prescription supposes a grant, or some equivalent document, to have once existed, and *to have been lost by [* 479] lapse of time.⁶ According to some eminent authorities, no claim by prescription could be made at the common law against the Crown,⁷ on the principle "nullum tempus occurrit regi."

¹ Introd. Part 2, § 43.

² Co. Litt. 113 a.

³ Dr. & Stud. Dial. 1, c. 8; Finch, Comm. Laws, 31; Vin. Abr. Presc. B. pl. 2; Brooke, Abr. Presc. pl. 19; *Wilkinson v. Proud*, 11 M. & W. 33. A man may, however, prescribe to hold land as tenant in common with another. (Littleton, sect. 310; Brooke, Abr. in loc. cit. and Trespass, 122.)

⁴ Co. Litt. 114 a.; 5 Co. 109 b; Com. Dig. Franchises, A. 2.

⁵ 2 Blackst. Comm. 265; 3 Cruise's Dig. 423, 4th Ed.; 1 Vent. 387.

⁶ 2 Blackst. Comm. 265; Butl. Co. Litt. 261 a, n. (1); *Potter v. North*, 1 Vent. 387; 13 Hen. VII. 16 B. pl. 14.

⁷ 2 Ro. Abr. 264, Prescription, C.; Com. Dig. Præsc. F. 1; Plowd. 243; 38 Ass. pl. 22. See, however, Plowd. 322; Hargr. Co. Litt. 119 a, note (1); 114

§ 369. Customary rights differ from prescriptive in this, that the former are usages applicable to a district or number of persons, while the latter are rights claimed by one or more individuals, or by a corporation,¹ as existing either in themselves and their ancestors or predecessors, or as annexed to particular property.² The latter is called prescribing in a *que estate*, or, in other words, laying the prescription in the party and those whose estate he has. And here it is necessary to observe that, at the common law, every prescription must have been laid in the tenant of the fee simple; and that parties holding any inferior interest in the land could not prescribe, by reason of the imbecility of their estates, but were obliged to prescribe under cover of the tenant in fee, by alleging his immemorial right to the subject-matter of the claim, and deducing their own title from him.³

Requisites of a prescriptive right — Legal and living memory.

§ 370. A prescriptive or customary right, in order to be valid, must have existed undisturbed from time [* 480] *immemorial;⁴ by which, at the common law, was meant, as the words imply, that no evidence, verbal or written, could be adduced of any time when the right was not in existence;⁵ and the right was pleaded

b; 2 Inst. 168. It is difficult to see the reason of this if it be true, as stated in most of the books, that every prescription presupposes a grant before the time of legal memory (see the preceding note); and it is well known that a grant within the time of legal memory may be presumed against the Crown. (*Infra*.) The maxim "nullum tempus occurrit regi" was modified by 9 Geo. 3, c. 16, and 32 Geo. 3, c. 58, and other modern statutes.

¹ Co. Litt. 113 b; 4 Co. 32 a; 3 Cruise's Dig. 422, 4th Ed.

² Co. Litt. 113 b, 121 a; 2 Blackst. Comm. 265.

³ 2 Blackst. Comm. 264, 265.

⁴ 1 Blackst. Comm. 76; Litt. sect. 170.

⁵ Co. Litt. 115 a; Litt. sect. 170.

by alleging it to have existed "from time whereof the memory of man runneth not to the contrary."¹ But when the stat. West. 1 (3 Edw. I.), c. 39, had fixed a time of limitation in the highest real actions known to the law, it was considered unreasonable to allow a longer time in claims by prescription. Accordingly, by an equitable construction of that statute, a period of *legal* memory was established—in contradistinction to that of *living* memory—by which every prescriptive claim was deemed indefeasible, if it had existed from the first day of the reign of Richard I. (A. D. 1189);² and, on the other hand, to be at once at an end if shown to have had its commencement since that period.³

§ 371. After the time of limitation had been further reduced to sixty years by 32 Hen. 9, c. 2, and in many cases, including the action of ejectment, to twenty years by 21 Jac. 1, c. 16, it might have been expected that, by a similar equitable construction, the time of prescription would have been proportionably shortened. This, however, was not done, and it remained as before.* But the stat. 32 Hen. 8, c. 2, affected the subject in this way, that whereas, previously, a man might have prescribed for a right the enjoyment of which had been suspended for an indefinite number of years, it was thereby enacted that no person should *make any prescription by [* 481] the seizin or possession of his ancestors or predecessors, unless such seizin or possession had been within sixty years next before such prescription made.

¹ Litt. sect. 170; 2 Ro. Abr. 269, Prescrip. M. pl. 16.

² Co. Litt. 115 a.

³ Id.; 2 Blackst. Comm. 31; 2 Inst. 238; 3 Cruise's Dig. 425, 4th Ed.

⁴ 2 Blackst. Comm. 31, n. (u); Gale on Easements, 89, 3rd Ed.

§ 372. A prescriptive title once acquired may be destroyed by interruption. But this must be understood of an interruption of the right, not simply an interruption of the user.¹ Thus a prescriptive right may be lost or extinguished, by an unity of possession of the right, with an estate in the land as high and perdurable as that in the subject-matter of the right;² as, for instance, where a party entitled in fee to a right of way or common becomes seized in fee of the soil to which it is attached. But the taking any lesser estate in the land only suspends the enjoyment of the subject-matter of the prescription, without extinguishing the right to it, which accordingly revives on the determination of the particular estate.³

Evidence of prescription from modern user.

§ 373. The time of prescription thus remaining unaltered, it is obvious that, if strict proof were required of the exercise of the supposed right up to the time of Richard I., the difficulty of establishing a prescriptive claim must have increased with each successive generation. The mischief was, however, considerably lessened by the rules of evidence established by the courts. Modern possession and user being *prima facie* evidence of property and right, the judges attached to them an artificial weight, and held that when uninterrupted, uncontradicted and unexplained, they constitute proof from which a jury ought to infer a prescriptive right, coeval with the time of legal memory.

¹ Co. Litt. 114 b; *Canham v. Fisk*, 2 C. & J. 126, per Bayley, B.

² 3 Cruise's Dig. 428, 4th Ed.; Co. Litt. 114 b; 4 Co. 38 a; *R. v. Hermitage*, Carth. 241.

³ 3 Cruise's Dig. 426, 4th Ed.

The length of possession and user necessary for this purpose depends in some degree on [482] circumstances and the nature of the right claimed. On a claim of *modus decimandi*, where there is nothing in the amount of the sum alleged to be payable in lieu of tithe, inconsistent with its having been an immemorial payment, the regular proof should be payment of that amount in lieu of tithe by the parish, township, or farm, as far back as *living* memory will reach; coupled with evidence that, during that period, no tithes in kind have ever been paid in respect of that parish, township, or farm.¹ So, generally, in the case of other things to which a title may be made by prescription, proof of enjoyment, as far back as living memory, raises a presumption of enjoyment from the remote era.² And a like presumption may be made from an uninterrupted enjoyment for a considerable number of years. "If," says Alderson, B., in the case of *Jenkins v. Harvey*,³ "an uninterrupted usage of upwards of seventy years, unanswered by any evidence to the contrary, were not sufficient to establish a right like the present" (*i. e.*, a right to a toll on all coal brought into a port), "there are innumerable titles which could not be sustained." In that case,—the judge at *Nisi Prius* having directed the jury that he was not aware of any rule of law which precluded them from presuming the immemorial existence of the right from the modern usage,—the Court of Exchequer held the direction improper; and that the correct mode of presenting the

¹ *Bree v. Beck*, 1 Younge, 244; *Chapman v. Monson*, 2 P. Wms. 565; *Moore v. Bullock*, Cro. Jac. 501; *Lynes v. Lett*, 3 Y. & J. 405; *Chapman v. Smith*, 2 Ves. sen. 506.

² First Report of Real Property Commissioners, 51; *Blewett v. Tregonning*, 3 A. & E. 554, per Littledale, J.; *R. v. Carpenter*, 2 Show. 48.

³ 1 C. M. & R. 895.

point to them would have been, that, from the uninterrupted modern usage they should find the immemorial existence of the payment, unless some evidence was given [*483] ^{*to the contrary.}¹ In an old case of *Bury v. Pope*,² it was agreed by all the judges that a period of thirty or forty years was insufficient to give such a title to lights as would enable the owner of the land to maintain an action against the possessor of the adjoining soil for obstructing them. This, however, is inconsistent with the modern cases of *Cross v. Lewis*,³ and *R. v. Joliffe*.⁴ The latter of these was a quo warranto, calling on the defendant to show upon what authority he claimed to exercise the office of mayor of the borough of Petersfield. The defendant set up an immemorial custom, for the jury of the court-leet to present a fit person to be mayor of the borough, who presented him, the defendant; to which the Crown replied an immemorial custom for the court-leet to present a fit person to be bailiff, and that, at the court by which the defendant was presented to be mayor, the steward nominated the persons composing the jury, and issued his precept to the bailiff to summon them, who did so accordingly; whereas, by the law of the land, the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff. To this the defendant rejoined, that from time immemorial the steward used to nominate the jurors: and at the trial it was proved that for more than twenty years such had been the practice.

¹ 1 C. M. & R. 877; and see *Shephard v. Payne*, 16 C. B., N. S. 132; *Lawrence v. Hitch*, L. Rep., 3 Q. B. 521, 532. Vide *suprà*, sect. 1, sub-sect. 2, § 326.

² Cro. Eliz. 118.

³ 2 B. & C. 686.

⁴ Id. 54.

This was not answered by any evidence on the part of the Crown; and thereupon Burrough, J., who tried the case, told the jury that slight evidence, if uncontradicted, became cogent proof; and a verdict was given for the defendant. A rule was obtained for a new trial, on the ground that there was not sufficient evidence to warrant the finding of the jury; and Abbott, C. J., after argument, *expressed himself as follows:—"Upon [*484] the evidence given, uncontradicted, and unexplained, I think the learned judge did right in telling the jury that it was cogent evidence, upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had *recommended* them to find such a verdict, I should have thought that the recommendation was fit and proper. A regular usage for twenty years, not explained or contradicted, is that upon which many private and public rights are held, there being nothing in the usage to contravene the public policy." Holroyd and Best, JJ., concurring, the rule was discharged.

Prescriptive claim not defeated by trifling variations in exercise of the right.

§ 374. Where there is general evidence of a prescriptive claim extending over a long time, the presumption of a right existing from time immemorial will not be defeated by proof of slight, partial, or occasional variations in the exercise or extent of the right claimed. This subject is well illustrated by the case of *R. v. Archdall*.¹ In delivering the elaborate judgment of the court in that case, Littledale, J., says, p. 288, "It follows almost necessarily, from the imperfection and

¹ 8 A. & E. 281.

irregularity of human nature, that a uniform course is not preserved during a long period; a little advance is made at one time, a retreat at another; something is added or taken away, from indiscretion, or ignorance, or through other causes; and when by the lapse of years the evidence is lost which would explain these irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So, also, with regard to title; if that which has existed from time immemorial be scrutinized with the same severity which may properly be employed in canvassing a modern grant, without making allowance for the changes and accidents

[* 485] * of time, no ancient title will be found free from objection: that, indeed, will become a source of weakness, which ought to give security and strength. It has therefore always been the well-established principle of our law, to presume every thing in favor of long possession: and it is every day's practice to rest upon this foundation the title to the most valuable properties." There are several other cases illustrative of this principle. Thus, although in the case of a farm or district modus the occupiers are bound, in order to establish the prescription, to show with reasonable precision the description and boundaries of the lands said to be covered by it, and the identity of the lands for which the respective sums in lieu of tithes have been paid, still it has frequently been held in courts of equity, that a trifling and immaterial variation in the evidence, as to the boundaries of farms forming part of a district of considerable extent, when the greater part of such boundaries are tolerably certain, is not sufficient to destroy the modus payable in lieu of the tithes of

land proved to be within such boundaries.¹ So, again, in the case of *Bailey v. Appleyard*,² it is laid down by Coleridge, J., that a plea of prescription will be supported by proof of a prescriptive right larger than that claimed, but of such a nature as to include it; and in *Welcome v. Upton*,³ Alderson, B., asks, "Would the claim of a party to a right of way be defeated, by showing that some person had narrowed it by a few inches?" On the other hand, however, a general prescription is not supported by proof of a prescriptive right coupled with a condition.⁴

User evidence, although not sufficient to raise presumption of prescriptive right.

§ 375. Although the user is not sufficiently long or uniform to raise the presumption of a prescriptive right, * still it is entitled to its legitimate weight as evidence from which, coupled with other cir- [* 486] cumstances, the jury may find the existence of the right.

Presumption of prescriptive right from enjoyment, how put an end to.

§ 376. The presumption of prescriptive right, derived from enjoyment however ancient, is instantly put an end to when the right is shown to have originated within the period of legal memory;° and it is of course liable to be

¹ *Bailey v. Sewell*, 1 Russ. 239; *Rudd v. Wright*, 1 Younge, 147; *Rudd v. Champion*, Id. 173; *Bree v. Beck*, Id. 211. See *Ward v. Pomfret*, 1 Man. & Gr. 559.

² 8 A. & E. 161, 167. See *The Bailiffs of Tewkesbury v. Bricknell*, 1 Taunt. 142.

³ 6 M. & W. 536, 540.

⁴ *Paddock v. Forrester*, 3 Scott, N. R. 715; 3 M. & Gr. 903, and the cases there cited.

⁵ 2 Blackst. Com. 31; *Fisher v. Lord Graves*, 3 E. & Y., Tithe C. 1180.

rebutted by any species of legitimate evidence, direct or presumptive;¹ or even by the nature of the alleged right itself, which may make it impossible that it should have existed from the time of Richard I.² The existence of an ancient grant without date is not, however, necessarily inconsistent with a prescriptive right; for the grant may either have been made before the time of legal memory, or in confirmation of a prescriptive right.³ So, in *Scales v. Key*,⁴ where, on a question of false return to a mandamus, the issue turned on the existence of an immemorial custom within the city of London, the jury having found that the custom existed to 1689 (the case was tried in 1834), the judge at Nisi Prius refused to ask them whether the custom existed after that year, and directed a verdict to be entered for the defendant; and this ruling was confirmed by the court in banc. So, in *Biddulph v. Ather*,⁵ where, in support of a prescriptive right to wreck, evidence was adduced of uninterrupted usage for ninety-two years, it was held not to be *conclusively* negatived by two allowances in eyre 400 years previous, and a subsequent judgment in trespass; and the judge having left the whole case to *the jury, who found in favor of the claim, [* 487] the court refused to disturb the verdict. So, a prescriptive claim to a right of way for a party and his servants, tenants and occupiers of a certain close, and a justification as his servant and by his command, is not necessarily disproved by showing that the land had, fifty years before, been part of a large common, which was inclosed under the provisions of an inclosure act, and

¹ See *Taylor v. Cook*, 8 Price, 650, and the cases cited in the preceding notes.

² See *Bryant v. Foot*, L. Rep., 2 Q. B. 161; (in Cam. Scac.) 3 Id. 497.

³ *Eddington v. Clode*, 2 W. Bl. 989.

⁴ 11 A. & E. 819. See also *Welcome v. Upton*, 6 M. & W. 536.

⁵ 2 Wils. 23.

allotted to the ancestor of the party. The jury having found for the defendant, a rule was obtained to enter a verdict for the plaintiff, which was, however, discharged after argument. Parke, J., there says, "There is no rule of law which militates against the finding. From the usage, the jury might infer that the lord, if the fee were in him before the inclosure, had the right of way."¹ So it is laid down by Sir J. Leach, V. C., that, in the case of a *modus decimandi*, ancient documents cannot prevail against all proof of usage, unless they are consistent with each other, and unless the effect of them excludes, not the probability, but the possibility of the *modus*.²

Title by non-existing grant.

§ 377. Notwithstanding the desire of the courts to uphold prescriptive rights, there were many cases in which the extreme length of the time of legal memory exercised a very mischievous effect; as the presumption from user, however strong, was liable to be altogether defeated by showing the origin of the claim at any time since the 1 Rich. I. (A. D. 1189). Besides, possession and user are in themselves legitimate evidence of the existence of rights created since that period, the more obvious and natural proofs of which may have perished by time or accident. "Tempus," says Sir Edward Coke, "est edax rerum;"³ and records and letters patent, *and other writings, either consume or are lost, or [* 488] embezzled: and God forbid that ancient grants and acts should be drawn in question, although they cannot be shown, which, at the first, was necessary to the perfection

¹ *Codling v. Johnson*, 9 B. & C. 933. See further on this subject, *Hill v. Smith*, 10 East, 476; *Schoobridge v. Ward*, 3 M. & Gr. 896.

² *White v. Lisle*, 4 Madd. 224.

³ 12 Co. 5.

of the thing.”¹ Acting partly on this principle, but chiefly for the furtherance of justice and the sake of peace, by quieting possession,² the judges attached an artificial weight to the possession and user of such matters as lie in grant, where no prescriptive claim was put forward; and in process of time established it as a rule, that twenty years’ adverse and uninterrupted enjoyment of an incorporeal hereditament, uncontradicted and unexplained, was cogent evidence from which the jury should be directed conclusively to presume a grant or other lawful origin of the possession.³ This period of twenty years seems to have been adopted by analogy to the Statute of Limitation, 21 Jac. 1, c. 16, which makes an adverse enjoyment for twenty years a bar to an action of ejectment; for, as an adverse possession of that duration gave a possessory title to the land itself, it seemed reasonable that it should afford a presumption of right to a minor interest arising out of the land.⁴ The practical effect of this quasi *præsumptio juris* was considerably increased by the decision in *Read v. Brookman*,⁵ namely, that it was competent to plead a right to an incorporeal hereditament by deed, and excuse profert of the deed by alleging it to have been lost by time and accident. It became, therefore, a usual mode of claiming title to an

[* 489] incorporeal hereditament, to allege * a feigned grant within the time of legal memory, from

¹ 12 Co. 5.

² *Bright v. Walker*, 1 C. M. & R. 217; *Eldridge v. Knott*, Cowp. 215.

³ 3 Stark. Ev. 911, 3rd Ed.; 1 Greenl. Ev. § 17, 7th Ed.; 2 Wms. Saund. 175 a, 6th Ed.; *Bealey v. Shaw*, 6 East, 208; *Balston v. Bensted*, 1 Camp. 463; *Wright v. Howard*, 1 S. & Stu. 203; *Campbell v. Wilson*, 3 East, 294; *Lord Guernsey v. Rodbridges*, 1 Gilb. Eq. R. 4; *Bright v. Walker*, 1 C. M. & R. 217, &c.

⁴ 3 Stark. Ev. 911, 3rd Ed.; 2 Wms. Saund. 175 *et seq.*, 6th Ed., and the cases there cited.

⁵ 3 T. R. 151.

some owner of the land or other person capable of making such grant, to some tenant or person capable of receiving it,¹ setting forth the names of the supposed parties to the document,² with the excuse for profert that the document had been lost by time and accident. On a traverse of the grant, proof of uninterrupted enjoyment for twenty years was held cogent evidence of its existence; and this was termed making title by "non-existing grant."

§ 378. Much confusion has arisen from the loose language to be found in some of the books on the subject of this presumption. In *Holcroft v. Heel*,³ where the grantee of a market under letters patent from the Crown, suffered another person to erect a market in his neighborhood, and to use it for the space of twenty-three years without interruption, the Court of Common Pleas held, that the undisturbed possession of the market by the defendant for twenty-three years was a *clear bar* to the plaintiff's right of action. This case has, however, been strongly observed upon in 2 Wms. Saund. 175 c *et seq.*, 6th Ed. In the case of *Darwin v. Upton*,⁴ Lord Mansfield says, "The enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that, unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar*, like a statute of limitation; it is certainly a *presumptive bar*, which ought to go to the jury." And Buller, J., adds, "If the judge meant it" (*i. e.*,

¹ Shelford's Real Property Acts, 57, 7th Ed.

² *Hendy v. Stevenson*, 10 East, 55.

³ 1 B. & P. 400.

⁴ 2 Wms. Saund. 175 c, 6th Ed.

twenty years' uninterrupted possession of windows) "was an absolute bar, he was certainly wrong; if only as a presumptive bar, he was right." The judgment of Lord Mansfield, in *The * Mayor of Hull v. [* 490] Horner*,¹ is to the same effect. Again, the presumption of right from twenty years' enjoyment of incorporeal hereditaments is often spoken of as a "*conclusive* presumption,"² an expression almost as inaccurate as calling the evidence a "bar." If the presumption be "*conclusive*," it is a *præsumptio juris et de jure*, and not to be rebutted by evidence; whereas the clear meaning of the cases is, that the jury ought to make the presumption, and act definitively upon it, unless it is encountered by adverse proof. "The presumption of right in such cases," says Mr. Starkie,³ "is not conclusive; in other words, it is not an inference of *mere law*, to be made by the courts; yet it is an inference which the courts advise juries to make, wherever the presumption stands unrebutted by contrary evidence." It remains to add, that the doctrine in question has only been fully established in modern times, and was not introduced without opposition⁴ (a).

¹ Cowp. 102.

² 1 Greenl. Ev. § 17, 7th Ed.; per Lord Ellenborough in *Balston v. Bensted*, 1 Camp. 463, 465; and *Bealey v. Shaw*, 6 East, 208, 215, &c.

³ 3 Stark. Ev. 911, 3rd Ed.

⁴ "I will not contend," says Sir W. D. Evans, "that, after the decisions which have taken place, it may not be more convenient to the public that the doctrine which has been extensively acted upon, in the enjoyment of real estates, should be adhered to than departed from, though of very modern origin. * * * But I shall ever retain the sentiment, that the introduction of such a doctrine was a perversion of legal principles, and an unwarrantable assumption of authority." 2 Ev. Poth. 139.

(a) The presumption of a right, or even of a grant, from twenty years' user, is not a *conclusive* presumption. Lapse of time is proper to be considered by a jury, and is sufficient to support a presumption of a grant when unexplained. *Farrar v. Merrill*, 1 Me. 17. But it may be entirely overcome by evidence explaining the possession. *Irvin v. Fowler*, 5 Robt. (N. Y.) 482; *Hurst v. McNiel*.

§ 379. In order, however, to raise this presumption against the owner of the inheritance, the possession must be with his acquiescence; such a possession with the acquiescence of a tenant for life, or other inferior interest in the land, although evidence against the owner of the particular estate, will not bind the fee.¹ But the acquiescence of the owner of the inheritance may * either be proved directly, or inferred from circumstances.² *E. g.*, where, in order to prove [* 491] that a way was public, evidence was given of acts of user by the public for nearly seventy years; but during the

¹ 2 Wms. Saund. 175, 6th Ed., and the cases there cited.

² *Gray v. Bond*, 2 B. & B. 667.

1 Wash. (U. S.) 70; *English v. Register*, 7 Ga. 387; as that it was under a license from the real owner; *Nicto v. Carpenter*, 21 Cal. 455; *Nichols v. Gates*, 1 Conn. 318; and in subordination to his title; *Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Hall v. McLeod*, 2 Metc. (Ky.) 98. The presumption of a grant does not now depend upon the lapse of a period beyond which the memory of man runneth not, but arises after the lapse of the period fixed by statute in the several States, and the person claiming must, during the statutory period, have been in the open, adverse and uninterrupted possession of the land or right claimed. *Rooker v. Perkins*, 14 Wis. 79.

Actual possession need not have existed on the part of the claimant during the entire period, but the possession must be actual or constructive, so that the claim may fairly be supported by the presumption. *Glass v. Gilbert*, 58 Penn. St. 266.

The burden of proving title by adverse enjoyment is upon him who asserts it, against one having an actual paper title thereto; *Rowland v. Opdike*, 28 N. J. 101; *Stewart v. Cheatham*, 3 Yerg. (Tenn.) 60; and will not be presumed without specific proof; *Baldwin v. Buffalo*, 35 N. Y. 375; but as against one who has no paper title, prior possession is sufficient. Indeed, possession is sufficient, for however short a period it may have existed, as against every one but the true owner. The law presumes the title to be in him who has possession, and, in order to overcome this presumption, a better title must be shown. *Wendell v. Blanchard*, 2 N. H. 456; *Austin v. Bailey*, 37 Vt. 219; *Finch v. Alston*, 2 S. & P. (Ala.) 83; *McCall v. Pryor*, 17 Ala. 533; *Ward v. McIntosh*, 12 Ohio St. 231.

A grant may be presumed from the State, as well as from an individual, by lapse of time. *Grimes v. Bastrop*, 26 Tex. 310; *Palmer v. Hicks*, 6 Johns. (N. Y.) 133.

whole of that period the land had been on lease ; and the jury were directed that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public by the owner of the inheritance, at a time anterior to the land being leased ; this was held to be a proper direction.¹ And where the time has begun to run against the tenant of the fee, the interposition of a particular estate does not stop it.²

§ 380. This presumption only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted and unexplained. In the case of *Livett v. Wilson*,³ where, in answer to an action of trespass, the defendant pleaded a right of way by lost grant : at the trial, before Gaselee, J., it appeared that there was conflicting evidence as to the undisputed user of the way, and the alleged right had been pretty constantly contested ; whereupon the judge told the jury, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that that deed had been lost, they should find a verdict for the defendant ; and this ruling was fully confirmed by the court in banc. But the fact of possession for a less period than twenty years is still a circumstance from which, when coupled with other evidence, a jury may infer the existence of a grant.⁴(a)

¹ *Winterbottom v. Lord Derby*, L. Rep., 2 Ex. 316.

² *Cross v. Lewis*, 2 B. & C. 686.

³ 3 Bing. 115. See also *Doe d. Fenwick v. Reed*, 5 B. & A. 232, and *Dawson v. The Duke of Norfolk*, 1 Price, 246.

⁴ *Bealey v. Shaw*, 6 East, 215 ; see per Tindal, C. J., in *Hall v. Swift*, 4 Bing. N. C. 381, 383.

(a) In *Hawkins v. County Commissioners*, 2 Allen (Mass.), 251, possession of land for nine years only was held sufficient *prima facie* evidence of title to sus-

As against the Crown — as against the rights of the public.

* § 381. We have seen that by the common law a title by prescription could not be made [* 492] against the Crown.¹ (a) But this doctrine was not extended to the case of a supposed lost grant; although, in order to raise such a presumption against the crown, a longer time was required than against a private individual.² The same holds where it is sought to acquire a right in derogation of the rights of the public.³

Pews.

§ 382. By the general law and of common right, the pews in the body of a church belong to the parishioners at large, for their use and accommodation, but the distribution of seats among them rests with the ordinary, whose officers the churchwardens are, and whose duty

¹ *Suprà*, § 368.

² 1 Greenl. Ev. § 45, 7th Ed.; Tayl. Ev. § 114, 4th Ed. See *Bedle v. Beard*, 12 Co. 4, 5; *Mayor of Hull v. Horner*, Cowp. 102; *Gibson v. Clark*, 1 Jac. & W. 159; *Roe d. Johnson v. Ireland*, 11 East, 280; *Goodtitle d. Parker v. Baldwin*, Id. 488; *Jewison v. Dyson*, 9 M. & W. 540; *Brune v. Thompson*, 4 Q. B. 543.

³ *Weld v. Hornby*, 7 East, 195; *Chad v. Tilse*, 2 B. & B. 403; *Vooght v. Winch*, 2 B. & A. 662; *R. v. Montague*, 4 B. & C. 598.

tain a petition for damages resulting from the discontinuance of a highway. Indeed, it is held that naked possession, under a general claim of title, is evidence *primâ facie* of a title, and is sufficient until the contrary appears. *Wood v. McIntosh*, 12 Ohio St. 231; *Finch v. Alston*, 2 S. & P. (Ala.) 83; *Wendell v. Blanchard*, 2 N. H. 456; *Austin v. Bailey*, 37 Vt. 219; *McCall v. Pryor*, 17 Ala. 533; *Hunt v. Utter*, 15 Ind. 318.

(a) In *Palmer v. Hicks*, 6 Johns. (N. Y.) 133, the court held that a grant of land under a navigable stream would not be presumed to have been made to the owners of the adjacent lands without a long and exclusive use and possession of such a character as to warrant such a presumption. But that a grant from the State may be presumed seems to be well settled. *Grimes v. Bastrop*, 26 Tex. 310. But it will not be raised in favor of a party to a suit unless it is alleged in the pleadings; nor then if the pleadings contain any thing inconsistent with the grant. *Taylor v. Watkins*, 26 Tex. 688. Nor will it be presumed unless supported by more than twenty years' user. *Walker v. Hanks*, 27 Tex. 535.

it is to place the parishioners according to their rank and station, subject to the control of the ordinary.¹ But a right to a pew as appurtenant to an ancient *messuage* may be claimed by prescription, which presupposes a faculty;² and it is only in this light, namely, as easements appurtenant to messuages, that the right to pews is considered in courts of common law.³ That right is either *possessory* or *absolute*. The [* 493] *ecclesiastical courts will protect a party who has been for any length of time in possession of a pew or seat, against a mere disturber, so far at least as to put him on proof of a paramount title.⁴ And where the right is claimed as appurtenant to a messuage within the parish, possession for a long series of years will give a title against a wrong-doer in a court of common law.⁵ But where the origin of the pew is shown, or the presumption is rebutted by circumstances, the prescriptive claim is at an end.⁶ In order, however, to raise the presumption of a right by prescription or faculty against the ordinary, much more is required; and with respect to the length of occupation necessary for this purpose it is difficult to lay down any general rule.⁷

¹ *Corven's case*, 12 Co. 105-6; 3 Inst. 202; *Byerly v. Windus*, 5 B. & C. 1; *Pettman v. Bridger*, 1 Phillim. 323; *Fuller v. Lane*, 2 Add. 425; *Blake v. Usborne*, 3 Hagg. N. R. 733. See also *Mainwaring v. Giles*, 5 B. & A. 356; and *Bryan v. Whistler*, 8 B. & C. 288.

² *Parker v. Leach*, L. Rep., 1 P. C. 312, 327; *Pettman v. Bridger*, 1 Phillim. 324; *Walter v. Gunner*, 1 Hagg. C. R. 317; *Wyllie v. Mott*, 1 Hagg. N. R. 39.

³ 3 Stark. Ev. tit. Pew, 861, 3rd Ed.

⁴ *Pettman v. Bridger*, 1 Phillim. 324; *Spry v. Flood*, 2 Curt. 356.

⁵ *Darwin v. Upton*, 2 Wms. Saund. 175 c, 6th Ed.; *Kenrick v. Taylor*, 1 Wils. 326; *Stocks v. Booth*, 1 T. R. 428; *Rogers v. Brooks*, Id. 431, n.; *Griffith v. Matthews*, 5 T. R. 296; *Jacob v. Dallow*, 2 L. Raym. 755.

⁶ *Griffith v. Matthews*, 5 T. R. 296; *Morgan v. Curtis*, 3 Man. & Ry. 389.

⁷ See *Ashly v. Freckleton*, 3 Lev. 73; *Kenrick v. Taylor*, 1 Wils. 326; *Griffith v. Matthews*, 5 T. R. 296; *Pettman v. Bridger*, 1 Phill. 325; *Walter v. Gunner*, 1

Inconveniences of the old law.

§ 383. In this state of the law were passed the statutes 2 & 3 Will. 4, cc. 71 and 100. Notwithstanding all that had been done by facilitating the proof of prescriptive rights, and allowing the pleading of non-existing grants, cases still occurred in which the length of the time of prescription operated to the defeat of justice. On this subject the Real Property Commissioners expressed themselves as follows:¹ "In some cases the practical remedy fails, and the rule (of prescription) produces the most serious mischiefs. A right claimed by prescription is always disproved, by showing that it did not or could not exist at any one point of *time since the com- [* 494]
 mencement of legal memory, &c., &c. Amidst these difficulties, it has been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shown to have originated within time of legal memory, or to have been at one time extinguished by unity of possession, to resort to the clumsy fiction of a lost grant, which is pleaded to have been made by some person seized in fee of the servient, to another seized in fee of the dominant tenement. But besides the objection of its being well known to the counsel, judge and jury that the plea is unfounded in fact, the object is often frustrated by proof of the title of the two tenements having been such, that the fictitious grant could not have been made in the manner alleged in the plea. The contrivance therefore affords only a chance of protection, and may stimulate the adversary to an investigation, for

Hagg. C. R. 322; *Woolcombe v. Ouldrige*, 3 Add. 6; *Pepper v. Barnard*, 12 L. J., Q. B. 361.

¹ First Report of the Real Property Commissioners, 51.

an indirect and mischievous end, of ancient title-deeds, which for every fair purpose have long ceased to be of any use." There was also this inconvenience, that the evidence necessary to support a claim by lost grant would not support a claim by prescription; so that a plea of the former might miscarry from the evidence going too far.¹ Add to all which, it was well observed that the requiring juries to make artificial presumptions of this kind amounted, in many cases, to a heavy tax on their consciences, which it was highly expedient should be removed.² In a word, it became at length apparent that the evil could only be remedied by legislation, and the statutes in question were passed for that purpose.

§ 384. The former of these statutes, the 2 & 3 Will. 4, c. 71, entitled "An Act for shortening the Time of Prescription *in certain Cases," after reciting [* 495] that "the expression, 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice;" for remedy thereof proceeds to enact, in the first section, that "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any

¹ See per Littledale, J., in *Blewett v. Tregonning*, 3 A. & E. 583, 584.

² 2 Stark. Evid. 911, n. (d), 3rd Ed.; per Parke, B., in delivering the judgment of the court in *Bright v. Walker*, 1 C. M. & R. 217, 218.

land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose, by deed or writing."

Sect. 2. "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any water-course, or * the use of any water, to be enjoyed or derived [* 496] upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before-mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or

other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before-mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Sect. 3. "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sec. 4. "Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced *in for one year after the party inter-
[* 497] rupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

Sect. 5. "In all actions upon the case and other pleadings, wherein the party claiming may now by law allege

his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenements in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be especially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

Sect. 6. "In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim."

[* 498] *Sect. 7. "The time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

Sect. 8. "When any land or water upon, over, or from which any such way or other convenient water-course or use of water shall have been, or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter, as herein last before-mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof."

Construction of this Statute.

§ 385. A large number of decisions on the construction of this important statute are to be found in the books, the discussion of which would be altogether out of place here. There are, however, a few points which require notice. 1. The earlier sections of the statute, being in the affirmative, do not take away the common law; and consequently do not prevent a party pleading

a prescriptive claim, or claim by lost grant, in the same manner as he might have done before the act passed; and it is common in practice for a party to state his claim differently in several counts or pleas, relying in *some on the common law, and in others on the statute.' 2. The words in sect. 4 — "some suit [* 499] or action wherein the claim or matter to which such period may relate shall have been or shall be brought in question" — mean, generally, *any* such suit or action; and not, individually, *each* suit or action in which the question may from time to time arise.' 3. The word "presumption" in the 6th section is used in the sense of *artificial* presumption, or presumption which without any other evidence shifts the burden of proof; the meaning of the section being, that no inference shall be drawn from the *unsupported* fact of an enjoyment for less than the prescribed number of years. But it was not intended to divest enjoyment for a shorter period of its natural weight as evidence, so as to preclude a jury from taking it into consideration, with other circumstances, as evidence of a grant; which accordingly they may still find to have been made, if they are satisfied that it was made in point of fact.' 4. The statute does not apply to easements or profits à prendre *in gross*, *e. g.*, to a claim of free fishery in the waters of another.' Lastly, it will be observed, that while the 2nd section speaks of "any way or other *easement*, water-course, or use of water," the 8th uses the words "way or other *convenient* water-course, or use of water;" and two suppositions have been advanced

¹ See *Blewett v. Tregonning*, 3 A. & E. 554; *Wilkinson v. Proud*, 11 M. & W. 33; *Lowe v. Carpenter*, 6 Exch. 825; *Warburton v. Parke*, 2 H. & N. 64, &c.

² *Cooper v. Hubbuck*, 12 C. B., N. S. 456, 467.

³ See *Bright v. Walker*, 1 C. M. & R. 211.

⁴ *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

to explain this apparent inconsistency: one, that the word "convenient" has crept into this section by mistake, instead of "easement;" the other, that "convenient" is a mistake for "convenience," a word used in old books as synonymous with easement.¹

Has not taken away the common law.

[*500] *§ 386. We have seen that "tithes, rent and services" are excepted out of the 2 & 3 Will. 4, c. 71, s. 1. The two latter are provided for by the Statute of Limitations, 3 & 4 Will. 4, c. 27; the provisions of which are irrelevant to our present purpose; and the former by 2 & 3 Will. 4, c. 100, which, in its first section, enacts, that "all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a modus decimandi, the payment or render of such modus, and, in cases of claim to exemption or discharge, showing the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a modus decimandi, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the modus claimed, or, in case of claim to exemption or discharge,

¹ Gale on Easements, 104, 3rd Ed.

the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or *writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, [* 501] dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of modus made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of modus made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to

make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice; unless it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing." By sect. 8, "In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim."¹ This enactment, *like the former, has not taken away [* 502] the common law.²

Incorporeal rights not affected by—presumption of the dedication of highways to the public..

§ 387. 2. We proceed, in the second place, to consider the presumptions made from user of incorporeal rights not coming within the statutes above referred to. Among the foremost of these may be ranked the presumption of the dedication of highways to the public. "A road," says Littledale, J., in *R. v. Mellor*,³ "becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and

¹ There are several other provisions and exceptions in this statute which are not inserted, as the practical operation of presumptive evidence of exemption from tithe has been almost put an end to by the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, and subsequent acts. The 2 & 3 Will. 4, c. 100, has been amended in some respects by 4 & 5 Will. 4, c. 83.

² *The Earl of Stamford v. Dunbar*, 13 M. & W. 822.

³ 1 B. & Ad. 32, 37.

of an acceptance of the right by the public." A dedication by the owner is insufficient without an acceptance on the part of the public.¹ The fact of dedication may either be proved directly, or inferred from circumstances,² especially from that of permissive user on the part of the public. If a man opens his land so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way,³ unless some act be done by the owner to show that he had only intended to give a license to pass over the land, and not to dedicate a right of way to the public.⁴ Among acts of this kind may be reckoned the putting up a bar, or excluding, by positive prohibition, persons from passing.⁵ The common course is by shutting up the passage for one day in each year.* Where no acts of this nature have been done, there is no fixed rule as to the length of user [* 503] which is sufficient, when unaccompanied by other circumstances, to constitute presumptive evidence of a dedication; but unquestionably a much shorter time will suffice than is required to raise the presumption of a grant among private individuals. In the case of *The Rugby Charity v. Merryweather*,⁷ Lord Kenyon says,

¹ *R. v. Mellor*, 1 B. & Ad. 32; *R. v. St. Benedict*, 4 B. & A. 447.

² *R. v. Wright*, 3 B. & Ad. 681; *Surrey Canal Company v. Hall*, 1 Man. & Gr. 392; *R. v. St. Benedict*, 4 B. & A. 447.

³ *The British Museum v. Finnis*, 5 C. & P. 460; *Lade v. Shepherd*, 2 Str. 1004.

⁴ *Barraclough v. Johnson*, 8 Ad. & E. 99.

⁵ *R. v. Lloyd*, 1 Camp. 260; *Roberts v. Karr*, Id. 262, n.; *Lethbridge v. Winter*, Id. 263, n.

⁶ Per Patteson, J., in *The British Museum v. Finnis*, 5 C. & P. 460, 465. But the keeping a gate across a road is not *conclusive* evidence against its being a public way, for it may have been granted with the reservation of keeping a gate in order to prevent cattle straying. *Davies v. Stephens*, 7 C. & P. 570.

⁷ 11 East, 376, n.

that "in a great case, which was much contested, six years was held sufficient;" and where the existence of a highway would be beneficial to the owner of the soil, a dedication has been presumed from a user of four or five years.¹ But the animus or intention of the owner of the soil in doing the act, or permitting the passage, must be taken into consideration.² "In order," says Parke, B., in *Poole v. Huskinson*,³ "to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate — there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." And this animus or intention is to be determined by the jury.⁴ But the dedication of a highway to the public must be the act, or at least with the consent, of the owner of the fee; the act or assent of a tenant for any less interest will not suffice; although [* 504] the assent of the * owner of the inheritance may be inferred from circumstances.⁵ Upon the whole, the public are favored in questions of this nature;⁶ and it seems that, when a road has once been a king's highway, no lapse of time or cessation of user

¹ *Jarvis v. Dean*, 3 Bing. 447.

² *Poole v. Huskinson*, 11 M. & W. 827; *R. v. The Inhabitants of East Mark*, 11 Q. B. 877.

³ 11 M. & W. 827, 830.

⁴ *Barraclough v. Johnson*, 8 A. & E. 99; *Surrey Canal Company v. Hall*, 1 Man. & G. 392.

⁵ *Baxter v. Taylor*, 1 Nev. & M. 11; *R. v. Bliss*, 7 A. & E. 550; *Wood v. Veal*, 5 B. & A. 454.

⁶ *Winterbottom v. Lord Derby*, L. Rep., 2 Ex. 316; *Davies v. Stephens*, 7 Car. & P. 570; *R. v. Barr*, 4 Camp. 16; *Jarvis v. Dean*, 3 Bing. 447; *R. v. Hudson*, 2 Str. 909; *Harper v. Charlesworth*, 4 B. & C. 574.

⁷ *R. v. The Inhabitants of East Mark*, 11 Q. B. 877; *R. v. Petrie*, 4 E. & B. 737.

will deprive the public of the right of passage whenever they please to resume it.¹ The presumption in question can, it is said, be made against the Crown.²

Presumption of surrender or extinguishment of rights by non-user.

§ 388. The next subject calling for attention here is the presumption of the surrender or extinguishment of incorporeal rights by *non-user*. This is altogether unaffected by the prescription acts,³ and the general principle is thus stated by Abbott, C. J., in *Doe d. Putland v. Hilder*:⁴ "The long enjoyment of a right of way by A to his house or close, over the land of B, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land: and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed." But the result of the cases on this subject would seem to be, that the non-user of a privilege or easement is merely evidence of abandonment; and that the question *of abandonment is one of fact, which must be determined on the whole of the circumstances [* 505] of each particular case.⁵

¹ 2 Selw. N. P. 1362, 9th Ed.; *Dawes v. Hawkins*, 8 C. B., N. S. 848, 858.

² *R. v. The Inhabitants of East Mark*, 11 Q. B. 877. See *ante*, §§ 368, 381.

³ Gale on Easements, 354, 3rd Ed.

⁴ 2 B. & A. 782, 791.

⁵ See per Wood, V. C., *Crossley v. Lightowler*, L. Rep., 3 Eq. 279, 292; *El-dridge v. Knott*, Cowp. 214; *Simpson v. Gutteridge*, 1 Madd. 609.

Easements.

§ 389. With respect to the presumed extinguishment of "Easements" from cessation of enjoyment, the following principles are laid down in a text work: "Though the law regards with less favor the acquisition and preservation of these accessorial rights than of those which are naturally incident to property, and, therefore, does not require the same amount of proof of the extinction as of the original establishment of the right; yet as an easement, when once created, is perpetual in its nature, being attached to the inheritance and passing with it, it should seem that some acquiescence on the part of the owner of the inheritance must be necessary, to give validity to any act of abandonment." Now easements are divided into *continuous* and *intermittent* — the former being those of which the enjoyment is or may be continued, without the necessity of any actual interference by man; as waterspouts, the right to air, light, &c.; and the latter being those of an opposite description, such as rights of way, &c. With respect to *continuous* easements, the correct inference from the cases seems to be, that there is no time fixed by law during which the cessation of enjoyment must continue, in order to raise the presumption of an abandonment; but it is for the jury to take all the circumstances of the case into their consideration, in order to see if there has been an intention to renounce the right.¹ It was held [* 506] by Lord Ellenborough at nisi * prius, that where a window has been shut up for twenty years, the case stands as if it had never existed.²

¹ Gale on Easements, 353, 354, 3rd Ed.

² Gale on Easements, 360, 3rd Ed., citing *Liggins v. Inge*, 7 Bing. 682, 693, per Tindal, C. J.; *Hale v. Oldroyd*, 14 M. & W. 789; *Lawrence v. Obee*, 3 Camp. 514.

³ *Lawrence v. Obee*, 3 Camp. 514.

§ 390. With respect to easements of the *intermittent* kind, there are some expressions to be found in the books which strongly favor the notion, that in order to raise the presumption of extinguishment from non-user alone, it must have reached the full period of twenty years;¹ in analogy to the Statute of Limitations, and the rule established respecting title by non-existing grant.² But it seems clear that mere intermittance of the user, or slight alterations in the mode of enjoyment, will not be sufficient to destroy the right when circumstances do not show any intention of relinquishing it;³ whilst, on the other hand, a much shorter period than twenty years, when it is accompanied by circumstances, such as disclaimer, or other indication of intention to abandon the right, will be sufficient to raise the presumption of extinguishment.⁴

Licenses.

§ 391. *Licenses* may be presumed; and as a general rule, from a much shorter period of enjoyment than twenty years.⁵ (a)

¹ Gale on Easements, 378, 379, 380, 3rd Ed., citing Co. Litt. 114 b; *Doe d. Putland v. Hilder*, 2 B. & A. 782, 791, per Abbott, C. J.; *Moore v. Rawson*, 3 B. & C. 332, 339, per Littledale, J.; *Holmes v. Buckley*, 1 Eq. Ca. Abr. 27, &c.

² *Suprà*, § 377.

³ Gale on Easements, 380, 3rd Ed., citing *Payne v. Shedden*, 1 M. & Rob. 382; *R. v. The Inhabitants of Chorley*, 12 Q. B. 515; *Ward v. Ward*, 7 Exch. 838; *Lovell v. Smith*, 3 C. B., N. S. 120, &c.

⁴ Gale on Easements, 381, 3rd Ed.; *Norbury v. Meade*, 3 Bligh, 241, 242; *Harvie v. Rogers*, 3 Bligh, N. S. 440; *R. v. Chorley*, 12 Q. B. 515; *Ward v. Ward*, 7 Exch. 838.

⁵ Phill. & Am. Ev. 478; 1 Phil. Ev. 491, 10th Ed.; *Doe d. Foley v. Wilson*, 11 East, 56; *Goodtitle d. Parker v. Baldwin*, Id. 488; *Ditcham v. Bond*, 3 Camp. 524; *Doe d. Earl of Dunraven v. Williams*, 7 C. & P. 332.

(a) A license can never be presumed when an act is done by one upon the premises of another, unless it is so done as to clearly imply that the owner of the estate knew of the act, and did not object to or disapprove it, and the act

*Presumptions of facts in support of beneficial enjoyment —
General principles.*

§ 392. 3. We proceed lastly to the numerous important presumptions of facts made in support of beneficial [* 507] * enjoyment. The general principle governing the subject is thus stated by Tindal, C. J., in *Doe d. Hammond v. Cooke*:¹ "No case can be put in which any presumption" (semble, any *artificial* presumption) "has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed." Presumptions of this kind are entitled to additional weight, if the possession would otherwise be unlawful, or incapable of satisfactory explanation.²(a) On the other hand, the terms

¹ 6 Bing. 174, 179. See, also, 1 Greenl. Ev., § 46, 7th Ed.; 3 Stark. Ev. 935, 3rd Ed.; *The Attorney-General v. The St. Cross Hospital*, 17 Beav. 435.

² 1 Greenl. Ev. § 46, 7th Ed.

itself must be such as to clearly raise such an inference. The fact that a person enters upon the premises of another and cuts timber, raises no presumption of a license, of itself, but in such a case the defendant must show that he had the owner's consent; *Welsh v. State*, 11 Tex. 368; *Prentiss v. Roberts*, 49 Me. 127; but when there has been a possession for twenty years, adverse and exclusive, a license will be presumed if necessary to sustain the title of the party so in possession. *Thompson v. Carr*, 5 N. H. 510.

(a) A grant may be presumed in favor of a possession of twenty years, to the extent of his occupancy; *Williams v. Donnell*, 2 Head (Tenn.), 695; *Rooker v. Perkins*, 14 Wis. 79; *Townsend v. Downer*, 32 Vt. 183; *Farrar v. Merrill*, 1 Me. 17; *County v. Ferguson*, 13 Ill. 33; even from the State; *Grimes v. Bastrop*, 26 Tex. 310; *Walker v. Hunks*, 27 Tex. 535; *Palmer v. Hicks*, 6 Johns. (N. Y.) 33; but the possession must be adverse and exclusive; *Brandt v. Odgen*, 1 Johns. (N. Y.) 156; *Rooker v. Perkins*, *ante*; *Townsend v. Downer*,

in which the presumption will be brought under the notice of the jury are considerably influenced by the nature of the document or other matter to be presumed, the facility or difficulty of adducing more direct proof, and by the right in question being favored or disfavored by law.

Instances.

§ 393. There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Matters of record generally,¹ and even acts of parliament,² at least very ancient ones,³(a) will

¹ Plowd. 411; Finch, L. 399, 400; Styl. 22.

² Skinn. 78; *Lopez v. Andrews*, 3 Man. & R. 329, n.; *Eldridge v. Knott*, Cowp. 215, per Lord Mansfield.

³ *R. v. The Chapter of Exeter*, 12 A. & E. 532.

ante; but it need not always be in the actual grantee; *Glass v. Gilbert*, 58 Penn. St. 266; it is enough to show that by legal possibility such a grant might have been made. *Williams v. Donnell, ante*. Such a presumption may be repelled by parol proof when the grant depends upon such proof; *Nuto v. Carpenter*, 21 Cal. 455; *Farrar v. Merrill*, 1 Me. 17; *English v. Register*, 7 Ga. 387; or by proof tending to a contrary conclusion. *Chiles v. Conley*, 2 Dana (Ky.), 21.

(a) While twenty years of uninterrupted user, adverse and exclusive, is required to establish an easement by prescription, yet it may be lost by non-user for a shorter period. Time is not so much a material element in determining the question of abandonment, as the *intention* of the person in whom the right existed, to be inferred from his acts; and what period may be sufficient in a given case depends upon all the accompanying circumstances. *Moore v. Rawson*, 3 B. & C. 332; *Liggins v. Inge*, 7 Bing. 682, 693.

Lord Denman in *Regina v. Chorley*, 12 Ad. & El. (N. S.) 519, laid down the doctrine applicable in such cases in apt language and by apt illustration. He said, "we apprehend that as an express release of the easement would destroy it at any moment, so the cessor of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect, without any reference to time. Thus, this being a right of way to the defendant's malt-house, and the mode of user by driving carts and wagons to an entrance from the lane into the malt-house yard, if the defendant had removed his malt-house, turned the premises to some other use, and walled up the entrance, and then for any considerable period of time acquiesced in the unrestrained use by the public, we conceive that the easement would have been clearly gone. It is not so

thus be presumed; as also will grants from the crown,¹ letters patent,² writs of ad quod damnum and inquisitions thereon,³ by-laws of corporations,⁴ * fines and [* 508] recoveries,⁵ feoffments,⁶ the enfranchisement of copyholds,⁷ endowment of vicarages,⁸ exemption from tithes,⁹ consent of the ordinary to composition deeds,¹⁰ powers in charities to sell lands, and sales under such powers,¹¹ orders of justices of the peace to stop up roads,¹² &c. So, likewise, the fact of a particular person having sat in parliament in ancient times,¹³ the disseverance of tithes by the requisite parties previous to the restraining

¹ *Mayor of Hull v. Horner*, Cowp. 102; *Gibson v. Clark*, 1 Jac. & W. 159; *Read v. Brookman*, 3 T. R. 158; *The Attorney-General v. The Dean of Windsor*, 24 Beav. 679.

² *Read v. Brookman*, 3 T. R. 158; *Pickering v. Lord Stamford*, 2 Ves. jun. 583.

³ *R. v. Montague*, 4 B. & C. 598.

⁴ *Case of Corporations*, 4 Co. 78, a.

⁵ *Read v. Brookman*, 3 T. R. 151, 159, per Buller, J., citing *Hasselden v. Bradney*, T. 4 Geo. III. C. B. See *Doe d. Fenwick v. Reed*, 5 B. & A. 232.

⁶ 21 Edw. IV. 74 B. pl. 5.

⁷ *Roe d. Johnson v. Ireland*, 11 East, 280.

⁸ *Crimes v. Smith*, 12 Co. 4; *Parsons v. Bellamy*, 3 E. & Y. 832; *Cope v. Bedford*, Palm. 426; *Wolley v. Brownhill*, M'Clel. 317; *Inman v. Whormby*, 1 Y. & J. 545; *Apperley v. Gill*, 1 C. & P. 316.

⁹ *Norbury v. Meade*, 3 Bligh, 211; *Bayley v. Drever*, 1 A. & E. 449; *Rose v. Calland*, 5 Ves. 186.

¹⁰ *Sawbridge v. Benton*, 2 Anst. 372.

¹¹ *St. Mary Magdalen v. The Attorney-General*, 6 Ho. Lo. Cas. 189.

¹² *Williams v. Eytton*, 4 H. & N. 357.

¹³ *Hasting's Peerage Case*, 8 Cl. & Fin. 144.

much the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, as the intention in him, which the one or the other indicates, which are material for the consideration of the jury." See *R. Co. v. Covington*, 2 Barb. (N. Y.) 746; *Corning v. Gould*, 16 Wend. (N. Y.) 535; *Farrar v. Cooper*, 34 Me. 400; *Hatch v. Dwight*, 17 Mass. 489; *Jennison v. Walker*, 11 Gray (Mass.), 425; Co. Litt. 1146; *Hayford v. Spokesfield*, 100 Mass. 491; *Wiggins v. McCleary*, 49 N. Y. 346; *Arnold v. Stevens*, 24 Pick. (Mass.) 106; *Queen v. Field*, 102 Mass. 114; *Smiles v. Hastings*, 24 Barb. (N. Y.) 44.

statutes,¹ copyhold customs,² admittance to³ and surrender of copyholds,⁴ surrender by tenant for life,⁵ and lawful executorship,⁶ will be presumed from lapse of time. In one case it was held that induction might be presumed from fifteen years' undisturbed possession.⁷ And where it is proved that, from a very early period, there has been the constant performance of divine service in an ancient chapel, even although there be no proof that either marriages were solemnized or burials performed therein, this raises the presumption *that the chapel was consecrated.* So, the lawful origin of a several fishery,⁸ the liability to [* 509] repair fences,⁹ the right to land nets,¹⁰ the death of remote ancestors without issue,¹¹ mesne assignments of leaseholds,¹² re-conveyances by feoffee to feoffor,¹³ and by mortgagee to mortgagor,¹⁴ &c., &c., have in like manner been presumed. (a)

¹ *Countess of Dartmouth v. Roberts*, 16 East, 334.

² *Doe d. Mason v. Mason*, 3 Wils. 63.

³ *Watkins on Copyholds*, 269, Ed. 1797. See *Rawlinson v. Greaves*, 3 Bulst. 237.

⁴ *Knight v. Adamson*, 2 Freem. 106; *Wilson v. Allen*, 1 Jac. & W. 611.

⁵ 2 Wms. Saund. 42 d, 6th Ed.

⁶ *R. v. Barnsley*, 1 M. & Selw. 377.

⁷ *Chapman v. Beard*, 3 Anst. 942.

⁸ *Rugg v. Kingmill*, L. Rep., 1 Ad. & Ec. 343, 350; *Moysey v. Hillcoat*, 2 Hagg. N. S. 50.

⁹ *Malcomson v. O'Dea*, 10 Ho. Lo. Cas. 593.

¹⁰ *Barber v. Whiteley*, 34 L. J., Q. B. 212; *Boyle v. Tamlyn*, 6 B. & C. 329.

¹¹ *Gray v. Bond*, 2 B. & B. 667.

¹² *The Earl of Roscommon's Claim*, 6 Cl. & F. 97; *Doe d. Oldham v. Woolley*, 8 B. & C. 22.

¹³ *Earl d. Goodwin v. Baxter*, 2 W. Bl. 1228; *White v. Foljambe*, 11 Ves. 350.

¹⁴ *Tenny d. Whinnett v. Jones*, 3 M. & Scott, 472.

¹⁵ *Cooke v. Soltan*, 2 S. & Stu. 154.

(a) Twenty years adverse possession raises a presumption that the possessor had a deed of the property, and that the deed was duly and properly executed. *Valentine v. Piper*, 22 Pick. (Mass.) 85; *McNair v. Hunt*, 5 Mo. 300; *Cheney v.*

Presumption of conveyances by trustees — General rule.

§ 394. Under this head comes the important doctrine of the presumption of conveyances by trustees. It is a general rule, that whenever trustees ought to convey to the beneficial owner, it should be left to the jury to presume that they have so conveyed, where such presumption can reasonably be made.¹ This rule has been established to prevent just titles from being defeated by mere matter of form, but it is not easy to determine the extent of it. It may, however, be stated generally, that the presumption ought to be one in favor of the owner of the inheritance, and not one against his interest;² and the

¹ 3 Sugd. V. & P. 25, 42, 43, 10th Ed.; 1 Greenl. Evid. § 46, 7th Ed.; *Doe d. Bowerman v. Sybourn*, 7 T. R. 2; *Keene d. Lord Byron v. Deardon*, 8 East, 263, 266; *Viscountess Stafford v. Llewellyn*, Skin. 77; *Goodtitle d. Jones v. Jones*, 7 T. R. 43; *Doe d. Reede v. Reede*, 8 T. R. 122; *R. v. The Inhabitants of Upton Gray*, 10 B. & C. 807, 813, per J. Parke, J.; *England d. Syburn v. Slade*, 4 T. R. 682; *Wilson v. Allen*, 1 Jac. & W. 620; *Doe d. Hodsden v. Staple*, 2 T. R. 696; *Emery v. Grocock*, 6 Madd. 54.

² *Phill. & Am. Ev.* 476; *Doe d. Graham v. Scott*, 11 East, 483; *Doe d. Burdett v. Wrighte*, 2 B. & A. 719, 720.

Watkins. As a deed of partition after a separate possession for thirty years. *Hepburn v. Auld*, 5 Cranch (U. S.), 262; or a deed when possession for twenty years has been held under an executory contract for its purchase. *Hays v. Horine*, 12 Iowa, 61; or a surplus bond when necessary where lands have been sold for taxes followed by possession; *Cutter v. Brockway*, 24 Penn. St. 145; or the assignment of a land warrant or certificate of survey; *Duke v. Thompson*, 16 Ohio, 84; or a will may be presumed when necessary to confirm a long existing possession under an executor's deed; *Maverick v. Bailey*, 1 Bailey (S. C.), 59; and a survey and patent, and a deed from the patentee when necessary; *Jackson v. McCall*, 10 Johns. (N. Y.) 377; or that a deed, made by an agent, was made with full authority. *Jashoe v. McAtee*, 7 B. Monr. (Ky.) 279; or any conveyance made necessary by the peculiar circumstances of the case; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; *Church v. Ballard*, 2 Metc. (Mass.) 363; *Maverick v. Austin*, ante; even though defective in form or execution; *Hill v. Lord*, 48 Me. 83; unless deeds showing a defective title are produced. *Owings v. Norwood*, 2 H. & J. (Md.) 96.

rule is subject to this further limitation, that the presumption cannot be *called for where it would be a breach of trust in the trustees to make [* 510] the conveyance.¹ On the same principle, re-conveyances from the trustees to the cestui que trust will be presumed,² as also will, under proper circumstances, conveyances from old to new trustees.³

Presumption of the surrender of terms by trustees for years.

§ 395. Few subjects have given rise to greater difference of opinion than that of the presumption of the surrender of their terms by trustees for terms of years. In Lord Mansfield's time, the courts seem to have entertained motions upon it, which, if carried out in practice, would have gone far to enable them, by their own unsupported authority, to subvert trial by jury on the one hand, and confound all distinctions between legal and equitable jurisdiction on the other.⁴ In the case of *Lade v. Holford*,⁵ "Lord Mansfield," we are informed, "declared that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct the jury to presume it surrendered." There is no objection to the latter branch of this proposition, which has been always recognized in practice; for, by not assigning the term

¹ Phill. & Am. Ev. 476; Keene d. *Lord Byron v. Deardon*, 8 East, 267.

² *Hillary v. Waller*, 12 Ves. 250, 251. See 2 Sugd. Vend. & Pur. 196, 10th Ed.

³ *Roe d. Eberall v. Lowe*, 1 H. Bl. 446.

⁴ See 3 Sugd. Vend. & Pur. 39, 40, 42, 10th Ed.; *Evans v. Bicknell*, 6 Ves. 174, 184; *Lessee Lord Massey v. Touchstone*, 1 Sch. & L. 67, n. (c.); *Wallwyn v. Lee*, 9 Ves. 31; *Doe d. Hodsden v. Staple*, 2 T. R. 696; *Doe d. Bristow v. Pegge*, 1 T. R. 758, n.

⁵ Bull. N. P. 110.

for the benefit of the mortgagee, whose money he has received, and afterward setting it up against him, the mortgagor is guilty of a fraud; so that the presumption of the surrender of the term is really an application [*511] *of the legal maxim which presumes against fraud and covin,¹ and also of the rule which forbids a man to take advantage of his own wrong.² And it has accordingly been held that such a presumption will not be made in favor of a prior mortgagee against a subsequent mortgagee in possession of the title deeds, without notice of the prior incumbrance.³ But the general proposition, *never to suffer* a plaintiff to be nonsuited by a term outstanding in his trustees, is, at least if taken in its literal sense, inconsistent with principle, and at variance with subsequent authority.⁴ The surrender of a term is a question of *fact*; and the court has not only no right, but it would be most dangerous, to advise a jury to presume such a surrender, when all the evidence clearly indicated that it had never been made.

Surrender of term presumable from circumstances.

§ 396. The surrender of a term, like any other fact, may be inferred from circumstances.⁵ It is said, however, that the fact of a term having been satisfied is not,

¹ See 3 Sugd. Vend. & Pur. 42, 10th Ed., and per Abbott, C. J., in *Doe d. Putland v. Hilder*, 2 B. & A. 782, 790.

² See *infra*, chap. 7.

³ *Goodtitle d. Norris v. Morgan*, 1 T. R. 755; *Evans v. Bicknell*, 6 Ves. jun. 174, 184.

⁴ *Doe d. Hodsdon v. Staple*, 2 T. R. 684; *Doe d. Bowerman v. Sybourn*, 7 Id. 2; *Goodtitle d. Jones v. Jones*, Id. 43; *Doe d. Reade v. Reade*, 8 Id. 118; *Doe d. Shewen v. Wroot*, 5 East, 132.

⁵ 3 Stark. Ev. 926, note (m), 3rd Ed.; *White v. Foljambe*, 11 Ves. 351; *Doe d. Brune v. Martyn*, 8 B. & C. 497; *Bartlett v. Downes*, 3 B. & C. 616.

when standing alone, sufficient to raise the presumption of a surrender, but that there must be some dealing with the term.'

Surrender of term presumable from acts of owner of the inheritance, &c.

§ 397. Where acts are done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to be done or omitted if the term existed in the hands of a trustee, and if there do not appear to be any thing that should *prevent a surrender from having been made, a surrender of the term may be presumed.² But a [* 512] term of years assigned to attend the inheritance will not, *as among purchasers or incumbrancers*, be presumed to have been surrendered, merely on the ground of its having remained, for a series of years, unnoticed in marriage settlements and other family documents; and the cases in which a contrary doctrine has been laid down must be considered as overruled.³ It seems, however, that in equity a term which has *not* been assigned to attend the inheritance, and which has not been disturbed for a long time, will be presumed to be surrendered on a question of specific performance between seller and purchaser.

¹ *Evans v. Bicknell*, 6 Ves. jun. 174, 185; *Day v. Williams*, 2 C. & J. 460; *Doe d. Hodsden v. Staple*, 2 T. R. 684.

² Phill. & Am. Evid. 477; 1 Phill. Evid. 490, 10th Ed.; *Doe d. Putland v. Hilder*, 2 B. & A. 782, 791-2.

³ See on this subject Sugden's V. & P. vol. 3, c. xv., 10th Ed., where the cases are collected and ably commented on; also *Doe d. Lord Egremont v. Langdon*, 12 Q. B. 711; *Garrard v. Tuck*, 8 C. B. 231; and *Cottrell v. Hughes*, 15 C. B. 532.

⁴ 3 Sugd. V. & P. 66, 10th Ed., citing *Emery v. Grocock*, Madd. & G. 54, and *Ex parte Holman*, MS., 24th July, 1821.

§ 398. A great change in the law on this subject has been effected by the stat. 8 & 9 Vict. c. 112, which, after reciting that "the assignment of satisfied terms has been found to be attended with great difficulty, delay and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate," enacts, in the first section, "that every satisfied term of years which, either by express declaration or by construction of law, shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express * declaration, although hereby made to

[* 513] cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been designed or dealt with, after the said 31st day of December, 1845, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term." By the 2nd section "Every term of years now subsisting or hereafter to be created, becoming satisfied after the said 31st day of December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately, upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid." It has been held that

the protection to be afforded by this statute is not merely such as might have been set up in a court of law, but such as that a court of equity would not have restrained its being so set up.¹

Belief of juries.

§ 399. Whether, where presumptions are made in support of peaceable or beneficial enjoyment, the jury are bound to *believe* in the fact which they find, has been made a question; and there certainly are authorities both ways.² Upon the whole, it may perhaps safely be laid down that, as in all presumptions of this nature legal considerations more or less predominate, the jury * ought to find as directed or advised by the judge, unless the suggested fact appears absurd [* 514] or grossly improbable; in either of which cases, as he ought not to direct or advise them to find such a fact, so neither ought they to find it.

SUB-SECTION VI.

PRESUMPTIONS FROM THE ORDINARY CONDUCT OF MANKIND,
THE HABITS OF SOCIETY, AND THE USAGES OF TRADE.

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¹ *Doe d. Cadwalader v. Price*, 16 M. & W. 603; *Cottrell v. Hughes*, 15 C. B. 532; *Plant v. Taylor*, 7 H. & N. 211; *Owen v. Owen*, 3 H. & C. 88.

² See 3 Stark Ev. 918 and 926, note (m), 3rd Ed.; *Doe d. Newman v. Putland*, 3 Sugd. V. & P. 61, 10th Ed., per Richards, C. B.; *Hillary v. Waller*, 12 Ves.

*Presumptions from the ordinary conduct of mankind, &c.
Miscellaneous instances.*

§ 400. The presumptions drawn from the ordinary conduct of mankind, the habits of society, and the usages of trade, are numerous; and several of them come under the head of presumptions of law. The occupation of land carries with it an implied agreement on the part of the tenant to manage the land according to the course of good husbandry and the custom of the country.¹ Rent paid by one who is in possession of the land out of which the rent issues, is, in the absence of evidence to the contrary, presumed to be a rent service.² So, where the mere existence of a tenancy is proved, a tenancy from year to year will be presumed; and if the day of its commencement does not appear, it will be settled by the custom of the country.³ Leases for uncertain terms are *prima facie* leases at will; but where a tenant holds over after the expiration of a term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation.⁴ Where a servant, at least a servant in husbandry, or a menial servant, is hired generally, without any stipulation as to time, the hiring will be presumed to have been for a year, unless there are circumstances to raise a presumption to the contrary.⁵ A promise to marry, generally, is

239, 252, per Sir William Grant, M. R.; *Day v. Williams*, 2 C. & J. 459, 460, per Bayley, B.; *St. Mary Magdalen v. The Attorney-General*, 3 Jurist, N. S. 675, per Lord Wensleydale.

¹ *Powley v. Walker*, 5 T. R. 375; *Legh v. Hewitt*, 4 East, 154.

² See *Hardon v. Hesketh*, 4 H. & N. 175.

³ *Gresley*, Evid. in Equity, 368.

⁴ *Roe d. Bree v. Lees*, 2 W. Bl. 1171, 1173, per De Grey, C. J.

⁵ *Digby v. Atkinson*, 4 Camp. 275; *Johnson v. St. Peter's, Hereford*, 4 A. & E. 520. See *Roe d. Jordan v. Ward*, 1 H. Bl. 97; and *Roberts v. Hayward*, 3 C. & P. 432.

⁶ 3 Stark. Ev. 999, 3rd Ed.; Chitt. Contr. 518-519, 7th Ed.

interpreted a promise to marry within a reasonable time;¹ and, on proof of a regular marriage per verba de præsenti, consummation is implied.² The important rule, that confessions and other forms of self-deserving evidence are receivable against the party who makes them,³ seems founded on this principle. To this class belong also many presumptions of knowledge. Thus a man is presumed to know what deeds he has executed,⁴ although probably in many cases the presumption is not a strong one; the members of a club,⁵ or a stock exchange,⁶ are presumed to be acquainted with its rules; and it is said, that parties claiming under a lease are presumed to know the title under which they took, and the circumstances connected with it.⁷

Other instances.

* § 401. There are other presumptions derived from the ordinary conduct of mankind. Thus, [* 516] the canceling,⁸ or taking the seals off,⁹ a deed, or tearing a will in pieces,¹⁰ is *prima facie* evidence of a revocation, though the presumption may be rebutted. So where a will, duly executed, remains in the custody of the testator, but cannot be found after his death, the law presumes that it has been revoked.¹¹

¹ *Potter v. De Roos*, 1 Stark. 82; *Phillips v. Crutchley*, 3 C. & P. 178; 1 Moore & P. 239.

² *Dalrymple v. Dalrymple*, 2 Hagg. 54, 65, 66.

³ See *infra*, chap. 7.

⁴ *Palmer v. Newell*, 2 Jurist, N. S. 268.

⁵ *Raggett v. Musgrave*, 2 C. & P. 556; *Alderson v. Clay*, 1 Stark. 405.

⁶ *Stewart v. Cauty*, 8 M. & W. 160; *Mitchell v. Newhall*, 15 Id. 309.

⁷ *Butler v. Lord Portarlington*, 1 Con. & L. 24.

⁸ *Alsager v. Close*, 10 M. & W. 576.

⁹ Latch. 226; *Price v. Powell*, 3 H. & N. 341.

¹⁰ *In the goods of Colberg*, 2 Curt. 832.

¹¹ *Finch v. Finch*, L. Rep., 1 P. & D. 371.

Date of documents.

§ 402. It may be stated as a general rule that, *prima facie*, documents should be taken to have been made or written on the day they bear date.¹ This has been held to apply to letters,² bills of exchange and promissory notes,³ and the indorsements on them,⁴ and also to bankers' cheques.⁵ So, a deed is presumed to have been executed,⁶ and delivered,⁷ on the day it is dated. This presumption is however easily displaced, at least so far as it relates to the *precise* date; and the rule itself is subject to exceptions.⁸ (a)

¹ *Smith v. Battens*, 1 Moo. & Rob. 341; *Anderson v. Weston*, 6 Bingh. N. C. 296; *Sinclair v. Baggaley*, 4 M. & W. 312; *Potez v. Glossop*, 2 Exch. 191; *Malpas v. Clements*, 19 L. J., Q. B. 435; *Yorke v. Brown*, 10 M. & W. 78; *Morgan v. Whitmore*, 6 Exch. 716.

² *Hunt v. Massey*, 5 B. & Ad. 902; *Goodtitle d. Baker v. Milburn*, 2 M. & W. 853; *Potez v. Glossop*, 2 Exch. 191. See however the observations of Lord Wensleydale in *Butler v. Lord Mountgarrett*, 7 Ho. Lo. Cas. 633, 646.

³ *Anderson v. Weston*, 6 Bingh. N. C. 296.

⁴ *Smith v. Battens*, 1 Moo. & R. 341.

⁵ *Laws v. Rand*, 3 C. B., N. S. 442.

⁶ *Anderson v. Weston*, 6 Bingh. N. C. 296, 300.

⁷ *Stone v. Grubham*, 1 Rol. 3, pl. 5; *Oshey v. Hicks*, Cro. Jac. 263.

⁸ *Anderson v. Weston*, 6 Bingh. N. C. 296, 301; *Sinclair v. Baggaley*, 4 M. & W. 312; *Gibson v. King*, Car. & M. 458; *Wright v. Lainson*, 2 M. & W. 739; *Edwards v. Crook*, 4 Esp. 39.

(a) All instruments are presumed to have been executed on the day they bear date, unless there is something upon the face of the instrument itself to rebut this presumption. Thus, if a deed, note or other paper requires to be stamped, and the stamp to be duly canceled before the instrument becomes legally operative, the date of the execution of the instrument will be presumed to be that indicated by the cancellation of the stamp; otherwise the date of the instrument is *prima facie* its true date. *Abrams v. Pomeroy*, 13 Ill. 133; *Dodge v. Hopkins*, 14 Wis. 630; *Meldrum v. Clark*, 1 Morr. (Iowa) 130; *Breck v. Cole*, 4 Sandf. (N. Y.) 79; but this is only a *prima facie* presumption and may be overcome by proof, and shown to have been executed on a different day. *Meril v. Dawson*, Hempst. (Tenn.) 563; *Abrams v. Pomeroy*, *ante*.

Presumptions from the course of business — In public offices — In private offices.

* § 403. Many presumptions are drawn from the usual course of business in public offices. [* 517] Thus, if a letter is put into a post-office, that is *prima facie* proof, until the contrary appears, that the party to whom it is addressed received it in due course.¹ By some statutes this sort of proof has been made conclusive in certain cases where the letter is registered,² and in some even where it is not.³ Presumptions of this kind are also made from the course of business in private offices; such as those of merchants,⁴ attorneys,⁵ &c.

Other presumptions from the usages of trade.

§ 404. There are several other presumptions drawn from the usages of trade. Thus, where a partnership is found to exist between two persons, but there is no evidence to show in what proportions they are interested, it is to be presumed that they are interested in equal moieties.⁶ So, bills of exchange and promissory notes are presumed to have been given for consideration.⁷ And a bill of exchange, in the absence of proof to the contrary, is presumed to have been accepted within a reasonable time after its date, and before it came to maturity.⁸

¹ *Kufh v. West*, 3 Esp. 54; *Warren v. Warren*, 1 C. M. & R. 250; *Kieran v. Johnson*, 1 Stark. 109; *Stocken v. Collin*, 7 M. & W. 515.

² See 6 & 7 Vict. c. 18, ss. 100 & 101; 28 Vict. c. 36, s. 9, &c.

³ See 19 & 20 Vict. c. 47, s. 53-54; 25 & 26 Vict. c. 89, ss. 62, 63, &c.

⁴ *Hetherington v. Kemp*, 4 Camp. 193; *Toosey v. Williams*, 1 Mood. & M. 129; *Hawkes v. Salter*, 4 Bingh. 715; *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, Id. 379.

⁵ *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890.

⁶ *Farrar v. Beswick*, 1 Moo. & R. 527, per Parke, B.

⁷ Byles on Bills, 2 and 108, 8th Ed.

⁸ *Roberts v. Bethell*, 12 C. B. 778. For other instances, see *Carter v. Abbott*, 1 B. & C. 444; *Houghton v. Gilbert*, 7 C. & P. 701; *Leuckhart v. Cooper*, 7 C. & P. 119; *Cunningham v. Fonblanque*, 6 C. & P. 44.

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* SUB-SECTION VII.

PRESUMPTION OF THE CONTINUANCE OF THINGS IN THE STATE
IN WHICH THEY HAVE ONCE EXISTED.

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Presumption of the continuance of things in the state in which they have once existed.

§ 405. It is a very general presumption, that things once proved to have existed in a particular state are to be understood as continuing in that state, until the contrary is established by evidence, either direct or circumstantial.(a) Thus, where seizin of an estate has been shown, its continuance will be presumed;¹

¹ *Wrotesley v. Adams*, Plowd. 193; *Smith v. Stapleton*, Id. 431; *Cockmen v. Farrer*, T. Jones, 181.

(a) Thus, when a man's residence is once shown to have been in a place, it will be presumed to continue there until the contrary is proved. *Kilburn v. Bennett*, 3 Metc. (Mass.) 199; *Prather v. Palmer*, 4 Ark. 456; *Randolph v. Easton*, 23 Pick. (Mass.) 242. Or that a person shown to have been married remains in that relation. *Erskine v. Davis*, 25 Ill. 251. Or that a person once competent to make a will remains so. *Allen v. Pub. Admr.*, 1 Brad. (Surr. Rep.) N. Y. 378. But presumptions of the continuance of a given state of things only exists in reference to such matters as are of a continuous nature. That is, such a state of things as would be likely to continue, unless interrupted by other causes outside of the relations themselves. The fact that a person is seen standing on a street to-day does not warrant the presumption that he will remain there forever, or even five minutes; but if a person is shown to be in the employment of a person to-day, he will be presumed to remain in that person's employment until the contrary is shown. Presumptions of this character are reasonable.

as also will that of a parochial settlement,¹ of the authority of an agent,² &c.; and there are several instances to be found in the books, where this presumption has been held stronger than the presumption of innocence, or than those derived from the course of nature. Thus, on an indictment for libelling a man in his capacity of public officer, on proof of the prosecutor having held the office previous to the publication of the libel, his continuing to do so was presumed;³ (a) and it is said that where adultery has been proved, its continuance will be presumed while the parties live under the same roof.* So, although the law in general presumes * against insanity, yet where the fact of insanity has been shown, its continuance will be pre- [* 519] sumed; and the proof of a subsequent lucid interval lies on the party who asserts it.⁵ (b)

¹ *R. v. Tanner*, 1 Esp. 304.

² See *Smout v. Ilbery*, 10 M. & W. 1.

³ *R. v. Budd*, 5 Esp. 230.

⁴ *Turton v. Turton*, 3 Hagg. N. R. 350.

⁵ Butl. Co. Litt. 246 b, note (1); Gresl. Ev. in Eq. 368; *Att.-Gen. v. Parnter*, 3 Bro. C. C. 441; *White v. Wilson*, 13 Ves. 88.

(a) This is upon the principle that a state of relations once proved to exist between parties continues to exist until the contrary is proved. The mere fact that a man and woman live together under the same roof does not raise a presumption that improper relations exist. But, when this is once established, the force of the presumption of innocence is overcome, and so long as they continue in a situation where their guilty conduct can continue, their guilty relations are presumed to continue. *Farr v. Payne*, 40 Vt. 615; *Hood v. Hood*, 2 Grant's Cas. (Penn.) 229; *Brown v. Burnham*, 28 Me. 38; *Brown v. King*, 5 Mect. (Mass.) 173; *People v. McLeod*, 1 Hill (N. Y.), 377; *Sullivan v. Goldman*, 19 La. Ann. 12; *O'Neil v. Mining Co.*, 3 Nev. 141; *Plank-road Co. v. Webb*, 27 Ala. 618; *Erskine v. Davis*, 25 Ill. 251.

(b) *Ripley v. Babcock*, 13 Wis. 425; *Sprague v. Duel*, 1 Clarke's Ch. (N. Y.) 90; *Titton v. Titton*, 54 Penn. St. 216; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Ballew v. Clark*, 2 Ired. (N. C.) 23; *Saxon v. Whittaker*, 30 Ala. 237. But there is no such presumption where the insanity results from a violent disease or from causes in themselves productive of merely temporary results. *Hix v. Whittimore*, 4 Mect. (Mass.) 545.

Presumption of the continuance of debts, &c.—Presumption of payment—Presumption of release.

§ 406. There are two particular cases which will require special consideration, namely, the presumption of the continuance of debts, obligations, &c., until discharged or otherwise extinguished; and the presumption of the continuance of human life. With respect to the former of these — a debt once proved to have existed is presumed to continue, unless payment or some other discharge be either proved or established by circumstances.¹ A receipt under hand and seal is the strongest evidence of payment, for it amounts to an estoppel, conclusive on the party making it;² but a receipt under hand alone,³ or a verbal admission of payment,⁴ is in general only *prima facie* evidence of it, and may be rebutted. Of the presumptive proofs of payment, the most obvious is that of no demand having been made for a considerable time; and previous to the 3 and 4 Will. 4, c. 42, s. 3, the courts, by analogy to the Statute of Limitations, had established the artificial presumption that where payment of a bond or other specialty was not demanded for twenty years, and there was no payment of interest or other circumstance to show that it was still in force, payment or release ought to be presumed by a jury.⁵ By that statute it is enacted that all actions for debt for rent upon an indenture of demise,

¹ *Jackson v. Irvin*, 2 Camp. 50. Also in the Roman law, Cod. lib. 4, tit. 19, l. 1.

² Gilb. Evid. 158, 4th Ed.

³ 1 Greenl. Ev. §§ 212 and 305, 7th Ed.

⁴ Tayl. Ev. §§ 171 and 788, 4th Ed.

⁵ *Oswald v. Legh*, 1 T. R. 270; *Washington v. Brymer*, Peake's Ev., App. xxv.

all actions of covenant or debt upon any * bond [* 520] or other specialty, and all actions of debt or scire facias upon any recognizance, shall be commenced and sued within ten years after the end of the then session of Parliament, or within twenty years after the cause of action, but not after. Independent of this statute, the fact of payment may be presumed by a jury from lapse of time or other circumstances which render the fact probable,¹ as, for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it.² Thus, where a landlord gives a receipt for rent due up to a certain day, all former arrears are presumed to have been paid, for it is likely that he would take the debt of longest standing first.³ In *Colsell v. Budd*⁴ it was laid down by Lord Ellenborough that, "after a lapse of twenty years, a bond will be presumed to be satisfied; but there must either be a lapse of twenty years, or a less time coupled with some circumstance to strengthen the presumption." In *Brembridge v. Osborn*,⁵ also, the same judge told the jury that where there is a competition of evidence on the question whether a security has or has not been satisfied by payment, the possession of the uncanceled security by the claimant ought to turn the scale in his favor, since in the ordinary course of dealing the security is given up to the party who pays it.⁶ Where land is

¹ 3 Stark. Ev. 823, 3rd Ed. See *Cooper v. Turner*, 2 Stark. Ev. 497; *Lucas v. Novisilienski*, 1 Esp. 296; *Sellen v. Norman*, 4 C. & P. 80; *Pfjel v. Vanbatenberg*, 2 Camp. 439.

² *Colsell v. Budd*, 1 Camp. 27. See Dig. lib. 22, tit. 3, l. 26, referred to *ante*, § 320.

³ Gilb. Ev. 157, 4th Ed.

⁴ 1 Camp. 27. See *Oswald v. Legh*, 1 T. R. 270.

⁵ 1 Stark. Ev. 374.

⁶ See Dig. lib. 22, tit. 3, l. 24; and Mascard. de Prob. Concl. 477.

conveyed to trustees in trust to pay debts, with remainder over, payment of the debts may be presumed from long possession by the remainderman, joined with other circumstances.¹

[* 521] *Release as well as payment may be inferred from circumstances.²

Presumption of revocation or surrender.

§ 407. On the same principle, although a revocation or surrender will not be presumed,³ it may be inferred from circumstances. In *Doe d. Brandon v. Calvert*,⁴ where, in answer to an ejectment, the defendant set up a mortgage term made to a stranger eighteen years before, and neither accounted for his possession of it, nor proved any payment of interest under the mortgage, the judge having advised the jury to presume a surrender of the mortgage term, the verdict was set aside by the court; and Mansfield, C. J., said, "There is no circumstance here to lead to the supposition that the deed was surrendered, except the eighteen years' time; if the deed had been assigned or surrendered, the instrument whereby it had been assigned or surrendered ought to be in the possession of the plaintiff. No reason is assigned to account why it should not be there; the question is therefore whether, from the circumstances of the eighteen years only, a surrender can be presumed. I have never known any case in which a shorter time than twenty years has been held sufficient

¹ *Anon.*, Vin. Abr. Ev., Q. a, pl. 7.

² *Washington v. Brymer*, Peake's Ev., App. xxv.; *Pickering v. Lord Stamford*, 2 Ves. jun. 583; *Reeves v. Brymer*, 6 Id. 516; *Motz v. Moreau*, 13 Mo. P. C. C. 376.

³ *Moreton v. Horton*, 2 Keb. 483.

⁴ 5 Taunt. 170.

to ground the presumption of a surrender, and that is often too short a time, for many times receipts and documents may be lost. But it is enough to say that twenty years is the time prescribed by act of Parliament as a bar to an ejectment, by analogy to which the doctrine of presumption has gone, and we might as well say a presumption might be raised by five years in assumpsit, or three years in trespass, as eighteen years in ejectment."

Presumption of the continuance of human life.

§ 408. We next proceed to the presumptions respecting the continuance of human life. [522] There is certainly, in the English law, no *præsumptio juris* relative to its continuance in the abstract; and in one case the Court of Queen's Bench said, that the law did not recognize the impossibility of a person who was alive in the year 1034, being still alive in the year 1827.¹ The death of any party once shown to have been alive is matter of fact to be determined by a jury; and as the presumption is in favor of the continuance of life, the onus of proving the death lies on the party who asserts it.²

Presumption of death from seven years' absence.

§ 409. The fact of death may, however, be proved by presumptive as well as by direct evidence.³ When a person goes abroad, and has not been heard of for a

¹ *Atkins v. Warrington*, 1 Chitty, Plead. 258, 6th Ed. See also *Benson v. Olive*, 2 Str. 920.

² *Smartle v. Penhallow*, 2 Lord Raym. 999; *Throgmorton v. Walton*, 2 Ro. 461; *Wilson v. Hodges*, 2 East, 312.

³ *Thorn v. Rolff*, Dy. 185 a, pl. 65; Anders. 20, pl. 42; *Webster v. Birchmore*, 13 Ves. 362.

long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of.¹ And the same rule holds generally with respect to persons who are absent from their usual places of resort, and of whom no account can be given.² This is incorrectly spoken of in some books as a presumption of *law*:³ but it is in truth a mixed presumption, said to have been adopted by analogy to the statute 1 Jac. 1, c. 11, s. 2,⁴—which exempts, from [* 523] * the penalties of bigamy, any person whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within the King's dominions, the one of them not knowing the other to be living within that time;—and the 19 Car. 2, c. 6, s. 2, respecting the lives of persons in leases, who shall remain beyond the seas, or elsewhere absent themselves in the realm for more than seven years, and who are thereupon, in the absence of proof to the contrary, to be deemed naturally dead.⁵

¹ *Hopewell v. De Pinna*, 2 Camp. 113; *Doe d. Banning v. Griffin*, 15 East, 293; *Lee v. Willock*, 6 Ves. 605; *Rust v. Baker*, 8 Sim. 443; *Dixon v. Dixon*, 3 Bro. C. C. 510; *Ommaney v. Stilwell*, 23 Beav. 332; *In the goods of How*, 1 Swab. & T. 53.

² *Doe d. Lloyd v. Deakin*, 4 B. & A. 433. See the judgment of Lord Ellenborough in *Doe d. George v. Jesson*, 6 East, 85; *Rowe v. Hasland*, 1 W. Black. 404; *Bailey v. Hammond*, 7 Ves. 590; *Doe d. France v. Andrews*, 15 Q. B. 756.

³ See the judgment in *Nepean v. Doe d. Knight*, 2 M. & W. 894.

⁴ This statute was repealed by 9 Geo. 4, c. 31, s. 22, which exempts from the penalties of bigamy "any person whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." This statute was in its turn repealed by 24 & 25 Vict. c. 95, and re-enacted by 24 & 25 Vict. c. 100, s. 57.

⁵ 4 Burge's Col. Law, 10, 11; Shelford's Real Property Statutes, 176, 177, 4th Ed. There are traces to be found in the books, of this sort of presumption

But where a party has been absent for seven years, without having been heard of, the only presumption arising is that he is dead; there is none as to the time of his death, as to whether he died at the beginning or at the end of any particular period during those seven years; and if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere fact that seven years have elapsed since such person was last heard of.¹ Cases in which this presumption has come in conflict with the presumption of innocence have been already considered;² and a jury may find *the fact of death from the lapse of a shorter period than seven [* 524] years, if other circumstances concur.³ (a)

before the statutes (see *Thorn v. Rolff*, Dyer, 185 a, pl. 65; and F. N. B. 196 L.), which might possibly have been adopted by analogy to the pre-existing presumption instead of its being copied from them.

¹ *Doe d. Knight v. Nepean*, 5 B. & Ad. 86; affirmed on error, 2 M. & W. 894. And see *Reg. v. Lumley*, L. Rep., 1 C. C. 196; *Re Phené*, L. Rep., 5 Ch. App. 139.

² *Supra*, sect. 1, sub-sect. 3, § 334.

³ 1 Greenl. Ev. § 41, 7th Ed.

(a) The mere fact that a person has been absent seven years does not of itself warrant a presumption of his death; it must also be shown that he has not been heard from within that time by his friends or relatives who would be most likely to receive news from him if living. *Brown v. Jewett*, 18 N. H. 230; *Whiteside's Appeal*, 23 Penn. St. 114; *Crawford v. Elliott*, 1 Houst. (Del.) 465; *Stinchfield v. Emerson*, 52 Me. 465; *Flynn v. Coffee*, 12 Allen (Mass.), 133; *Tilley v. Tilley*, 2 Bland. (Md.) 236; *Primm v. Stewart*, 7 Tex. 178; *Osborn v. Allen*, 26 N. J. 388; *Spurr v. Tainball*, 1 A. K. Marsh. (Ky.) 278; *Hulett v. Hulett*, 40 Vt.; *Eagle v. Emmett*, 4 Bradf. (N. Y.) 117. This is an instance where one presumption defeats another, as it is presumed that a person shown to be once living, continues to live until the contrary is shown; *Lotts v. Brook*, Hill & Denio's Supp. (N. Y.) 36; *Duke of Cumberland v. Graves*, 9 Barb. (N. Y.) 595; so strong is this presumption, that it will not be presumed that a person is dead, without proof to predicate it upon, even though, if living, he would be over one hundred years of age; *Burney v. Ball*, 24 Ga. 505; nor, although

*Presumption of survivorship where several persons perish
by a common calamity.*

§ 410. As connected with the subject of the continuance of human life, it remains to notice one which has embarrassed more or less the jurists and lawyers of every country. We allude to those unfortunate cases which have from time to time presented themselves,

at the age of twenty-two he was in very poor health, and if now living would be over eighty years of age. *Matter of Hall*, Wall. Jr. (U. S.) 85. The burden of proving the death of a person is upon him who sets it up; *Emerson v. White*, 29 N. H. 482; *Ashbury v. Sanders*, 8 Cal. 62; *Gilliland v. Martin*, 3 McLean (U. S.), 490; and if he relies upon the absence of the person for seven years without being heard from, he must establish both facts before the presumption arises. Mere fact of absence is not enough; he must show inquiries made at his last known residence abroad, or if he had none that is known to his friends, inquiries made of persons in the place where he was last known to reside before he went abroad, and inquiries among his relatives and friends who would be most likely to hear from him if living. *McCartee v. Canal*, 1 Barb. Ch. (N. Y.) 455; *Clarke v. Cummings*, 5 Barb. (N. Y.) 339. So the issuing of letters of administration upon the estate of a person is *prima facie* evidence of the person's death, as it will be presumed that the court issuing the letters did so upon competent proof of that fact. *Tisdale v. Conn.*, etc., Ins. Co., 26 Iowa, 170; *McNair v. Rayland*, 1 Dev. (N. C.) 533. Proof of absence without being heard from for a period *less* than seven years, though but a *day*, will not be sufficient. The full period must have elapsed, even though it is shown that the person was in feeble health when he left the neighborhood, or was very aged. *Ashbury v. Sanders*, 8 Cal. 62; *Burney v. Ball*, 24 Ga. 505; *Matter of Hall*, Wall. Jr. (U. S.) 85. But, while the law raises the presumption of death after seven years' absence *abroad* (which means either beyond seas, or out of the State), without being heard from, yet it does not, except in peculiar cases, raise any presumption as to the *time* of death, but in all legal proceedings the person will be regarded as having lived until the expiration of the seven years; *Eagle v. Emmett*, 4 Bradf. Surr. Rep. (N. Y.) 117; *White v. White*, 26 Me. 361; *Merritt v. Thompson*, 1 Hilt. (N. Y. C. P.) 550; *Puckett v. State*, 1 Sneed (Tenn.), 355; *but*, where a person sails on a voyage at a particular date, and the length of time which it takes to make the voyage is known, quickest and longest, it will, after the lapse of seven years without tidings from him, be presumed that he died within the period usually assigned for the longest voyage, and legal proceedings taken against or for him after that period will be deemed invalid. *Gerry v. Post*, 13 How. Pr. (N. Y.) 118.

where several persons, generally of the same family, have perished by a common calamity, such as shipwreck, earthquake, conflagration or battle; and the priority in point of time of the death of one over the rest exercises an influence on the rights of third parties. The civil law and its commentators were considerably occupied with questions of this nature, and seem to have established as a general principle (subject, however, to exceptions) that where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but, if above that age, the rule was reversed; while in the case of husband and wife, the presumption seems to have been in favor of the survivorship of the husband.¹ The French lawyers also, both ancient and modern, have taken much pains on this subject.² All the theories that have been formed respecting it are based on the assumption that the party deemed to have survived was likely, from superior strength, to have struggled longer against death than his companion. Now, even assuming that *primâ facie* a male would struggle longer against death than a female, a person of mature age than one under that of puberty, or very far advanced in years, the position is at best no more than a general rule; for, not only in * particular instances would the superior strength or health of the party supposed to be the weaker [* 525] reverse all, but the rules rest on the hypothesis that both parties were in exactly the same situation with reference to the impending danger; whereas it is obvious that their

¹ 1 Greenl. Ev. § 29, 7th Ed.; Dig. lib. 34, tit. 5.

² For the views of the old French lawyers see Burge's Colonial Law, vol. 4, chap. 1, sect. 1; and for the law of France at the present day, Code Civil, liv. 3, tit. 1, chap. 1, Des Successions, §§ 720, 721, 722.

respective situations, with reference to it, must usually be unascertainable in the fury of a battle or the horrors of an earthquake or a shipwreck. And the moral condition of the parties must not be overlooked; the brave survive the fearful and the nervous. Add to this, that, according to some modern physiologists, in some kinds of death the strongest perish first.¹ However that may be, in opening the door to this class of questions, the lawyers of Rome and France lost sight of the salutary maxim "*Nimia subtilitas in jure reprobatur.*"² The English law has judged more wisely; for, notwithstanding some questionable dicta, the true conclusion from the authorities seems to be, that it recognizes no *artificial* presumption in cases of this nature, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity, to its natural weight, *i. e.*, as a *circumstance* proper to be taken into consideration by a judicial tribunal, but which, standing alone, is insufficient to shift the burden of proof.³ * When, therefore, a

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¹ See Beck's Med. Juris. p. 397, 7th Ed., where is related an incident furnished by a modern traveler, who, in giving an account of a caravan coming in want of water in a Nubian desert, says that "the youngest slaves bore the thirst better than the rest; and while the grown-up boys all died, the children reached Egypt in safety." The same author adds, "as to *habit* and variety of constitution, all such that have a tendency to affections of the head and lungs should be deemed the first victims, in case the causes of death are of a description to affect these." We subjoin the following statement, though not from a work of authority. "It seems that death from hunger occurs soonest in the young and robust, their vital organs being accustomed to greater action than those of persons past the adult age." Chambers' Pocket Miscellany, Vol. 8, p. 119

² 4 Co. 5 b; 5 Co. 121 a; 3 Bulst. 65.

³ One of the best known cases on this subject is that of General Stanwix and his daughter, *R. v. Dr. Hay*, 1 W. Bl. 640. The celebrated Mr. Fearne composed two ingenious arguments, one in favor of each of the claimants. See his Works. There is, however, a prior case of *Hitchcock v. Beardsley*, West Rep. t. Hardw. 445; and an old case of *Broughton v. Randall*, Cro. El. 503,

party on whom the onus lies of proving the survivorship of one individual over another, has no evidence beyond the assumption that, from age or sex, that individual must be taken to have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to infer from this that the law presumes both to have perished at the same moment — this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that, for all that appears to the contrary, both individuals may have died at the same moment. The law, as stated above, has been fully established in the case of *Underwood v. Wing*, decided by the Master of the Rolls, Sir John Romilly,¹ whose judgment was affirmed by Lord Chancellor Cranworth, assisted by Wightman, J., and Martin, B.,² and finally by the House of Lords, in the case of *Wing v. Angrave*.³(a)

where a father and son were hanged together in one cart, and the son was presumed to have survived in consequence of his appearing to struggle longer, and some other circumstances. The cases of late years have become comparatively numerous. See *Taylor v. Diplock*, 2 Phillim. 261; *Wright v. Netherwood* (or *Samuda*), 2 Phillim. 266, note (c); *Mason v. Mason*, 1 Meriv. 308; *Colvin v. H. M. Procurator-General*, 1 Hagg. N. S. 92; *In the goods of Selwyn*, 3 Id. 748; *In the goods of Murray*, 1 Curteis, 596; *Satterthwaite v. Powell*, Id. 705; *Sillick v. Booth*, 1 Y. & C. C. C. 117; *Durrant v. Friend*, 5 De Gex & S. 343; *Underwood v. Wing*, 4 De G., M. & G. 633, 1 Jurist, N. S. 169, &c.

¹ 19 Beav. 459.

² 4 De G., M. & G. 633; 1 Jurist, N. S. 169.

³ 8 H. L. C. 183.

(a) In *Mochring v. Mitchell*, 1 Barb. Ch. (N. Y.) 264, this question was considered, and the court held that where a husband, wife and daughter perished at sea, by the same disaster, and no evidence existed as to who was the survivor, there was no presumption of law that the daughter survived the mother, but that it will be presumed that the husband survived his wife. See also Smith

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*SUB-SECTION VIII.

PRESUMPTIONS IN DISFAVOUR OF A SPOLIATOR.

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*Maxim "Omnia præsumuntur contra spoliatorem," &c.—
Instances of its application.*

§ 411. Another very important and rather favorite maxim is, "Omnia præsumuntur contra spoliatorem"¹ or "Omnia præsumuntur in odium spoliatoris"²—a maxim resting partly on natural equity, but much strengthened by the artificial policy of law. One of the leading cases on this subject is that of *Armory v. Delamirie*,³ where a person in humble station of life having

¹ 2 Ev. Poth. 336; 1 Stark Ev. 564, 3rd Ed.; 10 H. L. Ca. 591.

² Lofft, M. 389.

³ 1 Stra. 505. See ad. id. *Mortimer v. Uradlock*, 7 Jur. 45.

v. Croom, 7 Fla. 81, where this question was quite ably discussed, and in which it was held that in such cases the difference of age, sex and physical strength was proper to be considered in determining the question of survivorship. But in *Coye v. Latch*, 8 Metc. (Mass.) 371, the court held that, where a father aged seventy, and his daughter aged thirty-three years, both perished at sea by the same calamity, there was no presumption that either survived the other, and it would be presumed that they both died at the same time.

In *Pell v. Ball*, 1 Cheves (S. C.), 99, the court recognize the doctrine that in case of loss at sea by a common calamity, the question of age, sex and physical condition may be considered as the foundation of a presumption as to survivorship, but at the same time hold that if there is *any* evidence as to who survived, *however slight*, this evidence will take precedence over any presumption arising from the former facts.

found a jewel, took it to the shop of a goldsmith to inquire its value, who, having got the jewel into his possession under pretense of weighing it, took out the stones, and on the finder refusing to accept a small sum for it, returned to him the empty socket. An action of trover having been brought to recover damages for the detention of the stones, the jury were directed that, unless the defendant produced the jewel and thereby showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels that would fit the socket the measure of their damages. In the great case of *Annesley v. The Earl of Anglesea*,¹ the circumstances which pressed most against the defendant were, that he had caused * the plaintiff, who [* 528] be kidnapped and sent to sea, and afterward endeavored to take away his life on a false charge of murder—facts which, one of the judges said, spoke more strongly in proof of the plaintiff's case than a thousand witnesses. In highway robbery the law, in odium spoliatoris, will presume fear whenever property is taken with such circumstances of violence or terror, or threatening by word or gesture, as would in common experience induce a man to part with his property from an apprehension of personal danger;² so that, even where the prosecutor sought out the robber, and submitted to be robbed by him for the purpose of bringing him to justice, this was held to be robbery on the part of the accused.³ In the Roman law, although the general rule was that money paid was presumed to be in discharge of a debt, yet where a man,

¹ 17 Ho. St. Tr. 1140, 1430, per Mounteney, B.

² 2 East, P. C. 711.

³ *Norden's case*, cited Foster C. L. 129.

who was sued for a debt, denied having received the money, proof that he had in point of fact received it turned on him the burden of showing that it was in payment of a debt.¹ The application of the maxim to international law will be considered in another place.² (a)

Eloigning, &c., instruments of evidence, or introducing the crimen falsi into legal proceedings.

§ 412: But the most usual application of this principle is where there has been any forensic malpractice — by eloigning, suppressing, defacing, destroying, or fabricating documents, or other instruments of evidence, or introducing into legal proceedings any species of the crimen falsi. This not only raises a presumption that the documents or evidence eloigned, suppressed, &c., would, if produced, militate against the party eloigning,

¹ Dig. lib. 22, tit. 3, l. 25.

² *Infra*, sub-sect. 9.

(a) The case of *Armory v. Delamirie*, 1 Smith's Lead. Cas. 153, illustrates the rule applicable when a party has the means of freeing himself from a suspicion of wrong or fraud, but neglects to do so. In that case, the plaintiff, who was only a boy, found a jewel which he took to the defendant, a jeweler, for inspection, and the jeweler refused to return it, and an action of trover was brought, and upon trial refused to produce it. The court instructed the jury that where, in such cases, the defendant refused to produce the property that its value might be ascertained, they must presume it to be of the best quality of its species — in this instance, a jewel of the first water.

"But," says Powell in his work on Evidence, p. 50, "this presumption only arises when there is a suspicion of fraud. Where the deficiency of evidence arises from the negligence of a party, whose duty it is to establish its value, he cannot be benefited by his neglect, but the court will presume that the value was that which applies to the *cheapest* articles of its class. Thus in *Clennes v. Pezzey*, 1 Camp. 8, the plaintiff, who was a liquor merchant, sued for goods sold and delivered, and there was evidence that some hampers of full bottles had been delivered to the defendant, but no evidence as to what was in the bottles, or the quality, or the value of the liquors, Lord Ellenborough instructed the jury to presume that the bottles were filled with the cheapest liquors in which the plaintiff dealt.

suppressing, &c., but 'procures more ready admission to the evidence of the opposite side.' "If," says * L. C. J. Holt, "a man destroys a thing that is designed to be evidence against himself, a small [* 529] matter will supply it."² This rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong; and several instances of its application are to be found in the books. Thus, in the case of *R. v. The Countess of Arundel*,³ where the Crown was entitled at law to certain land, by reason of an attainder for high treason, a suit in equity was commenced by the attorney-general against the defendants to recover the lands; and on its being shown that the deeds whereby the estate came to the party attainted were not extant, but were very strongly suspected to have been suppressed and withheld by some under whom the defendant claimed, a decree was made that the Crown should hold and enjoy the land till the defendant should produce the deeds, and the court thereupon take further consideration and order. So, in the case of *Harwood v. Goodright*,⁴ where a person, who had made a will in favor of a certain party, was proved to have subsequently made another, the contents of which were unknown, Lord Mansfield said, that

¹ Ph. & Am. Ev. 458. See *Roe d. Haldane v. Harvey*, 4 Burr. 2484.

² *Anon.*, 1 L. Raym. 731.

³ Hob. 109. According to that report, there was only a vehement suspicion that the deeds had been suppressed; but, in the case of *Cowper v. Earl Cowper* (2 P. Wms. 749), Sir Jos. Jekyll, M. R., says, that he had caused the register book to be examined, from which it appeared that the deeds had been proved to have been extant and duly executed. For other instances of the manner in which the spoliation of documents is dealt with by courts of equity, see the cases there cited, and also *Dalston v. Coatsworth*, 1 P. W. 731; *White v. Lady Lincoln*, 8 Ves. 363; *Blanchet v. Foster*, 2 Ves. sen. 264; and *The Att.-Gen. v. The Dean of Windsor*, 24 Beav. 679, &c.

⁴ Cowp. 91.

spoliation was a circumstance from which the jury might fairly have presumed that it was a revocation of the former will. If a man refuses, after notice, to produce an agreement, it will be presumed to have [* 530] * been properly stamped; ¹ and it has been held at Nisi Prius, that where a document has been fraudulently obtained by one of the parties to a suit from a witness, whose property it is, and who is called on to produce it under a subpoena duces tecum, secondary evidence of the contents of the document may be given without notice to produce the original. ² (a)

Extent of the presumption against the spoliator of documents.

§ 413. It is said that the presumption against the spoliator of documents is not confined to assuming those documents to be of a nature hostile to him, and procur-

¹ *Crisp v. Anderson*, 1 Stark. 35.

² *Leeds v. Cook*, 4 Esp. 256.

(a) The refusal of a party, who has books or papers in his possession which he has been called upon to produce, to produce them upon the trial, does not warrant a presumption that, if they were produced, they would show the facts to be as alleged by the other party. The only effect is, to let in parol proof as to their contents; and if such secondary proof is vague, indefinite or uncertain as to dates, sums or any other matter material to the issue, every presumption and reasonable intendment will be against the party who might make the matter definite and certain by the production of the papers or documents themselves. But before such presumptions can attach, some proof of the contents of the papers must be given; *Barber v. Lyon*, 22 Barb. (N. Y.) 622; *Ins. Co. v. Ins. Co.*, 7 Wend. (N. Y.) 81; *Ins. Co. v. Evans*, 9 Md. 1; *Hanson v. Eustace*, 2 How. (U. S.) 653; *Hunt v. Collins*, 4 Iowa, 56; *Jewell v. Center*, 25 Ala. 498; *Eastman v. Amoskeag Co.*, 44 N. H. 143; *Cross v. Bell*, 34 id. 83; *Short v. Unangst*, 3 W. & S. (Penn.) 45; *Rector v. Rector*, 8 Ill. 105; *Cooper v. Gibson*, 3 Camp. 363; but where a party has a deed or other paper in his possession necessary to support his title, and he neglects or refuses to produce it, and attempts to make out his title by other evidence, this raises a strong presumption that if the paper was produced it would operate against him. *Merwin v. Ward*, 15 Conn. 377.

ing a more favorable reception for the evidence of his opponent, but that it has the further effect of casting suspicion on all the other evidence adduced by the party guilty of the malpractice.¹ “Qui semel malus, semper præsumitur esse malus eodem genere.”² In the case of *Doe d. Beanland v. Hirst*,³ Bayley, J., is reported to have told the jury, that they were to consider the circumstance of the erasure in a certain deed; observing that a man who was capable of making an alteration in one deed might be capable of suppressing another, if within his power. And the presumption arising from the fabrication or corruption of instruments of evidence is even stronger than that from the suppression or destruction of them.⁴

Occasionally carried too far.

§ 414. However salutary, and in general equitable, the maxim, “Omnia præsumuntur contra spoliatores,”^{*} must be acknowledged to be, it has been made the subject of very fair and legitimate [* 531] doubt whether it has not occasionally been carried too far. “The mere non-production of written evidence,” says Sir W. D. Evans,⁵ “which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far by being allowed to supersede the necessity of other

¹ Phill. & Am. Ev. 458.

² Cro. Car. 317. The text of the canon law went farther, laying it down, “Semel malus, semper præsumitur esse malus.” Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 8. But the commentators on that law seem disposed to restrict its effect to misconduct ejusdem generis. See Gibert, Corp. Jur. Can. Proleg. Pars Post. tit. 7, Cap. 2, § 2, N. 20; also Struvius, Synt. Jur. Civ. Exercit. 28, § 18, note (C), by Müller, and *infra*, sect. 3, sub-sect. 1.

³ 11 Price, 488.

⁴ 1 Stark. Ev. 564, 3rd Ed.

⁵ 2 Evans' Poth. 337.

evidence, instead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute." So, in the case of *Barker v. Ray*,¹ Lord Eldon said, "This court has a peculiar jurisdiction in cases of spoliation. * * * The jurisdiction of the court in matters of spoliation has gone a long way; indeed, it has gone to such a length that, if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that, if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be, in a great many instances, going a great length." Even when the positive fabrication of evidence is proved against a party, tribunals, whose object is the ascertaining of truth, will consider the nature of the case, and the temptation which might have led to fabrication. Is there any thing impossible in the suggestion, is it even unlikely, that in many cases the fabrication of evidence has been resorted to under the apprehension, perhaps the certain knowledge, that similar malpractice will be exercised by the other side?" Suppose a man is sued on a bond which he knows to be a forgery, but feels that it is altogether out of his power to prove it so. "Forge a release," or "Bribe a witness to prove payment,"² are suggestions too obvious not to have been occasionally acted on.

¹ 2 Russ. 72, 73.

² 3 Benth. Jud. Ev. 168.

³ Id. "One of the greatest and most difficult points in the Douglas cause," observes Sir W. D. Evans, "arose from Sir John Stewart having fabricated four letters, as received from La Marre the surgeon; a conduct certainly very suspicious, and calculated to induce a strong presumption against the general veracity of his account. I believe the true conclusion, from all the circumstances in that cause, to be that which was drawn by the House of Lords in

Especially in criminal cases.

*§ 415. Whatever weight may be legitimately attached to this presumption in civil [* 532] cases, great care must be taken in criminal ones, where life or liberty are at stake, not to give to spoliation, or similar acts, any weight to which they are not entitled. Nations and ages differ in the tone of moral feeling diffused through society, and in their reverence for the sacredness of an oath; men differ in strength of conscientious principle, as well as in courage; and tribunals differ in ability and impartiality, and in the quantity of evidence which they exact for condemnation. Undoubtedly, the suppression or fabrication of evidence by a party accused of a crime is always a *circumstance*, frequently a most powerful one, to prove his guilt. But many instances have occurred of innocent persons, alarmed at a body of evidence against them, which, although false or inconclusive, they felt themselves unable to refute, having recourse to the suppression or destruction of criminative, and even to the fabrication of exculpatory, testimony.¹ Sir Edward Coke relates a now well-known, but not on that account less remarkable or striking, instance of this.² An uncle had the bringing up of his niece, who was entitled to some landed property under her father's will, of which

support of the filiation; but it is impossible for great doubt not to hang upon a case affected by such a circumstance." 2 Ev. Poth. 337, note (a).

¹ 1 Stark. Ev. 565, 3rd Ed.; Ph. & Am. Ev. 467. Innocent persons have occasionally endeavored to defend themselves by setting up false alibis; and cases have probably occurred where the accused, though innocent, could not avail himself of his real defense without criminating others whom he is anxious not to injure, or even criminating himself with respect to other transactions.

² 3 Inst. ch. 104, p. 232; cited also 2 Hale, P. C. 290; 2 Ev. Poth. 338, Wills, Circ. Evid. 82, 3rd Ed., &c.

[* 533] *she would become possessed at the age of sixteen, and to which the uncle was next heir. When she was about eight or nine years old he was one day correcting her for some offense, when she was heard to say, "Oh, good uncle, kill me not!" After this time the child could not be heard of, though much inquiry was made after her; and the uncle, being committed to jail on suspicion of her murder, was admonished by the justices of assize to find out the child against the next assizes. Unable to do this, he dressed up another child to represent her; but the falsehood being detected, he was convicted and executed for the supposed murder. It afterward appeared, however, that, on being beaten by her uncle, the niece had run away into an adjoining county, where she remained until the age of sixteen, when she returned to claim her property. "Which case," he adds, "we have reported for a double caveat; first to judges, that they in case of life judge not too hastily upon bare presumption; and, secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offending God (the author of truth) overthrow himself, as the uncle did." A case is also related where, in a large company, a valuable trinket belonging to one of the party was suddenly missed. On the proposal of one of the company, all agreed to be searched, except one, who, by an obstinate refusal, drew down on himself strong suspicion. He, however, succeeded in obtaining a private audience of the master of the house; and on his pockets being turned inside out, there was discovered, instead of the trinket sought, a portion of eatables which he had taken to bring home to his wife, who had no means of procuring food.¹

¹ 3 Benth. Jud. Ev. 88-9.

* SUB-SECTION IX.

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PRESUMPTIONS IN INTERNATIONAL LAW.

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Presumptions in international law.

§ 416. We propose now to consider certain presumptions to be found in international law.

Public.

§ 417. The public international law, as is well known, is adopted by the common law, and is held to be part of the law of the land.¹ “In republicâ maximè conservanda sunt jura belli.”²

Acts done by an independent sovereign who is also the subject of another state.

§ 418. Where the subject of one state is also the independent sovereign of another, he is, of course, not responsible to the laws of the former state for acts done by him as such sovereign.³ And it seems that, in respect to any act done by such a person out of the realm of which he is a subject, or any act as to which it might be doubtful whether it ought to be attributed to the character of the

¹ 4 Blackst. C. 67.

² 2 Inst. 58.

³ *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 1; *Wadsworth v. The Queen of Spain*, 17 Q. B. 171; *De Haber v. The Queen of Portugal*, Id. 196.

sovereign prince or to that of the subject, the act ought to be presumed to have been done in the character of the sovereign prince.¹

Presumptions in disfavor of a spoliator.

[* 535] * § 419. The principle of presuming in disfavor of a spoliator² is recognized in international law,³ especially in those cases where papers have been spoliated by a captured party,⁴ and where neutral vessels are found carrying dispatches from one part of the dominions of a belligerent power to another.⁵

Private.

§ 420. With respect to private international law, its very existence rests on one important presumption. "In the silence of any positive rule," says Dr. Story, "affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests."⁶ So, says Professor Greenleaf, "A spirit of *comity*, and a disposition to friendly intercourse, are presumed to exist among nations as well as among individuals."⁷

Presumptions relating to domicile.

§ 421. There are other presumptions to be found in this branch of jurisprudence. Thus, the place of a per-

¹ *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 57, 58.

² See this subject generally, *suprà*, sub-sect. 8.

³ 1 Greenl. Ev. § 31, 7th Ed.

⁴ *The Hunter*, 1 Dods. Adm. Rep. 480; *The Johanna Emilie*, 18 Jur. 703.

⁵ *The Atalanta*, 6 Robins. Adm. R. 440.

⁶ Story, Conf. of Laws, § 38, 5th Ed.

⁷ 1 Greenl. Ev. § 43, 7th Ed.

son's birth is considered as his domicile, if it is at the time of his birth the domicile of his parents.¹ But a more important rule is, that the place where a person lives must be taken, *primâ facie*, to be his domicile, until other facts establish the contrary.² Where the family of a married man resides is generally to be deemed his domicile;³ and that of an unmarried man will be taken to be in the place where he transacts his business, exercises his profession, or assumes and exercises *municipal duties or privileges.⁴ And it is said to be a [* 536] principle, that where the place of domicile is fixed or determined by positive facts, presumptions from mere circumstances will not prevail against those facts.⁵ This does not mean that presumptive evidence is inadmissible to prove domicile; and, indeed, it amounts to little more than saying that the weaker evidence shall not be allowed to prevail against the stronger.

Other presumptions.

§ 422. It is also a principle of international law that, generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for in the latter case the law of the place of performance is to govern,⁶ because such may well be presumed to have been the intention of the parties.⁷ So, a foreign marriage will be

¹ Story, *Conf. of Laws*, § 46, 5th Ed.

² *Id.*; *Bruce v. Bruce*, 2 B. & P. 229, 230, note (a); *Bempde v. Johnstone*, 3 Ves. jun. 198; *Stanley v. Bernes*, 3 Hagg. N. R. 437.

³ Story, *Conf. of Laws*, § 46, 5th Ed.

⁴ Story, *Conf. of Laws*, § 47, 5th Ed.

⁵ *Id.*

⁶ *Id.* § 242 (1), 280-282.

⁷ *Id.* § 76.

presumed to have been celebrated, with the solemnities required by the law of the place where it is celebrated.¹ And the general presumptions against crime, fraud, covin, immorality, &c., are applicable to acts done abroad.

SUB-SECTION X.

PRESUMPTIONS IN MARITIME LAW.

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Presumptions in maritime law — Seaworthiness — Unseaworthiness.

§ 423. Among the most important presumptions in maritime law are those relating to seaworthiness.

[* 537] * Every ship insured on a *voyage* policy sails under an implied warranty that she is seaworthy. It is not necessary to inquire whether the assured acted honestly and fairly in the transaction; however just and honest his intentions may have been, if he was mistaken in the fact, and the vessel was not seaworthy, the underwriter is not liable.² But if a ship, shortly after sailing, turns out to be unfit for sea, without apparent or adequate cause, the burden of proof is thrown on the assured, and a jury ought to presume that the unseaworthiness existed before the commencement of the voyage;³ and this rule holds even though the ship encountered a violent storm, unless it can fairly be

¹ *R. v. The Inhabitants of Brompton*, 10 East, 282, 289, per L. Ellenborough.

² *Park, Ins.* 332, 7th Ed.; *Am. Ins.* 689, 690, 2nd Ed.; *Knill v. Hooper*, 2 H. & N. 277; *Douglas v. Scougall*, 4 Dow, 269.

³ *Munro v. Vandam*, *Park, Ins.* 333, note (a), 7th Ed.

inferred that the damage resulted from the storm.¹ The implied warranty of seaworthiness does not, however, at least in general, extend to *time* policies.²

Presumption of loss of missing ship—Implied stipulations against delay and deviation.

§ 424. Where a vessel is missing, and no intelligence of her has been received within a reasonable time after she sailed, it shall be presumed that she foundered at sea.³ Thus, where a ship was insured in 1739 from North Carolina to London, with a warranty against captures and seizures, an action was brought against the underwriters, alleging the loss to have been by sinking at sea, which came on to be tried in M. T., 17 Geo. II. The only evidence, however, was that she had sailed on her intended voyage, and had never since been heard of. On this it was objected on the part of the defendant that, as captures and seizures were excepted, it lay on the assured to prove a loss, as alleged * in the declaration; but Lee, C. J., said it would [* 538] be unreasonable to expect evidence of that, for as everybody on board was presumed to be drowned, the plaintiff had given the best proof the nature of the case admitted of; and he left the case to the jury, who found for the plaintiff.⁴ There is no precise time for this presumption fixed either by the common or general mari-

¹ *Douglas v. Scougall*, 4 Dow, 269; *Watson v. Clark*, 1 Dow, 336; *Parker v. Potts*, 3 Dow, 23.

² *Gibson v. Small*, 4 Ho. Lo. Cas. 353; *Thompson v. Hopper*, 6 E. & B. 172, 937; *Faucus v. Sarsfield*, Id. 192; *Biccard v. Shepherd*, 14 Moore, P. C. C. 471, 493.

³ *Park*, Ins. 105, 7th Ed.; *Green v. Brown*, 2 Str. 1199; *Houstman v. Thornton*, Holt, N. P. C. 243.

⁴ *Green v. Brown*, 2 Str. 1199, 1200.

time law,¹ although the laws of some countries have peculiar provisions on the subject;² but the court and jury will be guided by the circumstances laid before them, and the nature of the voyage and navigation. In order, however, to raise this presumption, it must be distinctly shown that the ship left port bound on her intended voyage.³ And when no express time is fixed for the commencement of a voyage, the law implies a stipulation that it shall be commenced without unreasonable delay, and that there shall be no unnecessary deviation from it when once commenced.⁴

SUB-SECTION XI.

MISCELLANEOUS PRESUMPTIONS.

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Miscellaneous presumptions.

§ 425. We now purpose to advert to some presumptions *likely to be met in practice, which have
 [* 539] not been hitherto noticed.

¹ Park, Ins. 106, 7th Ed.; *Houstman v. Thornton*, Holt, N. P. C. 243, per Gibbs, C. J.

² Park, Ins. 107, 7th Ed.

³ *Koster v. Innes*, R. & M. 333; *Cohen v. Hinckley*, 2 Camp. 51.

⁴ *M'Andrew v. Adames*, 4 M. & Scott, 517, 530, and the authorities there referred to, and Arn. Ins. 393 *et seq.*, 2nd Ed.

Relating to real estate.

§ 426. A large number of these relate to real estate, and are for the most part *quasi præsumptiones juris, i. e.*, presumptions which are almost as obligatory as presumptions of law, but which cannot be made without the intervention of a jury. Thus the soil of the seashore between high and low-water mark is presumed to belong to the Crown;¹ and so is the soil at the bottom of a navigable tidal river;² (a) but where the river is not navigable, it is presumed to be the property of the owners on each side, *ad medium filum aquæ*.³ (b) So the shore of the sea or of a tidal river, between ordinary high and low-water mark, is presumed to be extra-parochial.⁴ Whether the soil of lakes *primâ facie* belongs to the owners of the lands or manors on either side, *ad medium filum aquæ*, or to the Crown, seems a disputed point.⁵ (c)

¹ *Blundell v. Catterall*, 5 B. & A. 268, 304, per Bayley, J. See *The Att.-Gen. v. Chambers*, 4 De G., M. & G. 206; 5 Jur., N. S. 745.

² *Malcolmson v. O'Dea*, 10 Ho. Lo. Cas. 593, 618.

³ *Carter v. Murcot*, 4 Burr. 2162; *R. v. The Inhabitants of Landulph*, 1 Moo. & R. 393; *Lord v. The Commissioners of Sidney*, 12 Moo. P. C. C. 473; *McCannon v. Sinclair*, 2 E. & E. 53.

⁴ *Ipswich Dock Commissioners v. Overseers of St. Peter's, Ipswich*, 7 B. & S. 310; *Bridgewater Trustees v. Booth*, Id. 348; L. Rep., 2 Q. B. 4.

⁵ *Marshall v. The Ulleswater Steam Navigation Company*, 3 B. & S. 732; affirmed in error, 6 B. & S. 570.

(a) And this is a presumption of law which is conclusive, unless a grant from the State is shown; Wood on the Law of Nuisances, 607; Schultes, 122; also 101, 45 to 85; Woolrych on Waters, 41, 42; and all tidal streams are placed upon the same footing. Wood on the Law of Nuisances, 608, 609, 611; Hale's De Jure Maris, 3.

(b) In this country the rule is held differently in different States. For the rule in the various States, see Wood on the Law of Nuisances, chapter on Navigable Streams, pages 615, 616.

(c) Upon lakes and other large bodies of fresh water aside from rivers or running streams, the rule seems to be that adjacent owners only own to low-water mark. *Dwyer v. Rich*, 4 Irish Rep. 424; *People v. Canal Apprs*, 13

The same principle holds in the case of a public highway, the soil of which is taken, *prima facie*, to belong to the owners of the adjoining lands, *usque ad medium filum viæ*;¹ (a) and it *also applies to the case of a [* 540] private road.² But, as this presumption is founded on the supposition that the road originally passed over the lands of adjoining owners,³ it seems that it does not apply to roads set out under inclosure acts,⁴ or to cases where the original dedication of the road can be shown by positive evidence.⁵ And, in the case of a private road, it may be rebutted by proof of acts of ownership.⁶ Again, the lord of a manor is, *prima facie*, entitled to all the waste lands within the manor;⁷ but the presumption may be rebutted by circumstances.⁸ And strips of land adjoining a road are presumed to belong

¹ *Berry and Goodman's case*, 2 Leon. 148; *Grose v. West*, 7 Taunt. 39; *Anon.*, Loft. 358; *Cooke v. Green*, 11 Price, 739; *Salisbury (Marquis of) v. The Great Northern Railway Company*, 5 Jur., N. S. 70; *Berridge v. Ward*, 10 C. B., N. S. 400; *R. v. The Strand Board of Works*, 4 B. & S. 526.

² *Holmes v. Bellingham*, 7 C. B., N. S. 329.

³ *R. v. The Inhabitants of Edmonton*, 1 M. & Rob. 32.

⁴ *R. v. The Inhabitants of Edmonton*, 1 M. & Rob. 24; *R. v. Wright*, 3 B. & Ad. 681.

⁵ *Headlam v. Headley*, Holt, N. P. C. 463.

⁶ See *Holmes v. Bellingham*, 7 C. B., N. S. 329, 337.

⁷ *Doe d. Earl of Dunraven v. Williams*, 7 C. & P. 332.

⁸ *Simpson v. Dendy*, 8 C. B., N. S. 433.

Wend. (N. Y.) 355; *Bailey v. R. R. Co.*, 4 Harr. (Del.) 389; *Berry v. Snyder*, 8 Bush (Ky.), 266; *Wood on Nuisances*, 310; *Hubbard v. Bell*, 54 Ill. 510; *Brown v. Kennedy*, 5 H. & J. (Md.) 195; *Morgan v. Reading*, 3 S. & M. (Miss.) 306; *Rockwell v. Baldwin*, 53 Ill. 19; *Middleton v. Pritchard*, 3 Scam. (Ill.) 510; *Avery v. Fox*, 1 Abb. C. C. (U. S.) 246; *Comm'rs v. People*, 5 *Wend.* (N. Y.) 355; *People v. Tibbetts*, 19 N. Y. 523.

(a) The owners of land adjacent to a highway are presumed to own to the center thereof. Or, if the same person owns the land upon both sides thereof, to own the whole highway. The public has an easement therein for the purposes of public travel, but the adjacent owners hold the fee, unless they are restricted to the outer limits of the highway by their grant.

to the owner of the adjoining inclosed land, and not to the lord of the manor;¹ although this presumption also may be rebutted;² and is either done away, or considerably narrowed, by proof that those strips communicated with open commons, or larger portions of land.³ It seems to be a *præsumptio juris* that one part of a manor is not of a different nature from the rest;⁴ and in the case of party walls, where the quantity of land contributed by each party is unknown, the common use of the wall is *primâ facie* evidence that it and the land on which it is built are the undivided property of both.⁵

§ 427. Where the terms of the grant of a several fishery *are unknown, the owner of the fishery
[* 541] may be presumed to be the owner of the soil;⁶ but where those terms appear, and are such as to convey an incorporeal hereditament only, the presumption is destroyed.⁷ An ownership of the soil is *primâ facie* evidence of a right of fishery.⁸ Proof of a carriageway is presumptive evidence of a grant of a drift-way.⁹ Where rents of small amount have been paid to the lord of a manor for a long series of years, without any variation,

¹ *Doe d. Pring v. Pearsey*, 7 B. & C. 304; *Steel v. Prickett*, 2 Stark. 463; *Scoones v. Morrell*, 1 Beav. 251; *Doe d. Barrett v. Kemp*, 7 Bing. 332.

² *Doe d. Harrison v. Hampson*, 4 C. P. 267.

³ *Grose v. West*, 7 Taunt. 39.

⁴ Co. Litt. 78 b.

⁵ *Wiltshire v. Sidford*, 8 B. & C. 259, n.; *Cubitt v. Porter*, Id. 257.

⁶ *Duke of Somerset v. Fogwell*, 5 B. & C. 875, 886, per Bayley, J.; *Holford v. Bailey*, 8 Q. B. 1000, 1016, per Lord Denman, Id., in error, 13 Q. B. 426, 444, per Parke, B. See also *Marshall v. The Ulleswater Steam Navigation Company*, 3 B. & S. 732; affirmed, 6 Id. 570; and Co. Litt. 122 b, with Hargrave's note (7).

⁷ *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

⁸ See *Mayor, &c., of Carlisle v. Graham* L. Rep., 4 Ex. 361, 368; 3 Stark. Ev. 1253, 3rd Ed.

⁹ *Ballard v. Dyson*, 1 Taunt. 179.

the payment of them affords no evidence of title to the land — the presumption is, that they are quit-rents.¹ So, an allegation of seizin *primâ facie* implies occupation.² (a)

¹ *Doe d. Whittick v. Johnson*, Gow, N. P. C. 173-174, per Holroyd, J.

² *Stott v. Stott*, 16 East, 351. See *Clayton v. Corby*, 2 G. & Dav. 174; *England v. Wall*, 10 M. & W. 699.

(a) There is a large class of miscellaneous presumptions that the law raises, which it is impossible to give in connected form or under any of the heads referred to by the author. Some of these I have collected, merely as an illustration of the course pursued by courts in cases where certain inferences are warranted by a given state of facts. It may be said that, in all cases, *the law will presume that that which is the ordinary and natural result of a given state of things*, always results. Taking a given state of facts as a basis, the law will presume that to be the result which usually results, and which is most likely to result. Indeed, presumptions of fact are but mere inferences drawn from other facts and circumstances, and are always made upon the common principles of induction. *O'Gara v. Eisenlohr*, 38 N. Y. 296. A presumption of fact can only be predicated upon other facts. One presumption cannot be predicated upon another. The distinction between presumptions of fact and presumptions of law arises from the fact that the former are only *primâ facie* and may be overcome by proof, while the latter are conclusive, and proof will not be received to rebut them. Thus the law presumes payment of a debt, bond, mortgage or specialty of any description after the lapse of twenty years, but this is a mere presumption of fact, which may be overcome by showing that the debt has not in fact been paid. But when a judgment has been rendered in favor of one party against another, the law presumes that it was regularly and legally rendered, and proof will not be received to rebut the presumption. It is conclusive between the parties thereto.

Where it becomes important to determine whether or not a certain person was at a particular time in the employ of another, it may be shown by proving that such person was engaged in the other person's business, with that other person's knowledge, under circumstances such as show that he was there with his approval, and from these facts the law will presume an employment. *State v. Foster*, 23 N. H. 348. But the mere fact that a person in another's employ sells articles, the sale of which is prohibited by law, will not of itself raise the presumption that his employer knew of, and ratified his unlawful acts; but, when it is shown that the articles are of such a character, or are kept in such a situation, and are sold under such circumstances, that a person, paying ordinary attention to his own affairs, could not fail to know the fact, or even would be likely to know it, such guilty knowledge, and a consequent adoption of his acts, will be presumed. *State v. Tibbetts*, 35 Me. 81. So the fact that a clerk, servant or agent has been directed by his employer to do a particular thing does not warrant a presumption that the order was obeyed; but,

if the performance of the order is claimed, or is material, it must be proved. *Middleton v. Barnard*, 18 L. J. (Ex.) 433. The possession of a note, bill or draft by the maker is *primâ facie* evidence of its having been paid by him to the lawful holder, particularly if its execution is proved. *Lane v. Farmer*, 13 Ark. 63; *Brinkly v. Goin*, Breese (Ill.), 288. So the fact that a note and receipt bear the same date, and are for the same sum, raises a presumption amounting to *primâ facie* evidence that they were both given for the same thing. But, where a receipt bears a date prior to the note, and is for another sum, the court will not, in the absence of proof explaining the discrepancy, presume that they were given for the same debt or as a part of the same transaction. *Hollingsworth v. Martin*, 23 Ala. 591. So it is held that, where a person insured gives a premium note, and admits in it the issuing of a policy to him, of a certain number and date, such admission in the note is *primâ facie* evidence that such a policy, bearing the number, and issued at the date named, was issued. *Way v. Billings*, 2 Mich. 397. A receipt for rent or taxes of a given date raises a presumption that all preceding rent and taxes are paid; *Hodgdon v. Wight*, 36 Me. 326; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Attleborough v. Middleboro*, 10 Pick. (Mass.) 378; so a receipt in full of all demands is presumed to embrace notes and all indebtedness then existing. *Marston v. Wilcox*, 2 Ill. 290. The law never presumes the existence of a will; *Duke of Cumberland v. Graves*, 9 Barb. (N. Y.) 595; or that a testator omitted to make bequests to relatives other than those named in the will, by mistake, however near the relationship. *Merrill v. Sanborn*, 2 N. H. 499; as to the presumption of legal capacity in a testator upon proof of the due execution of the will, the rule seems to be that want of capacity must be proved by those who assert it, at least if it is proved that the testator has ever possessed such capacity. *Cowdry v. Cowdry*, 1 Houst. (Del.) 269; but see *Williams v. Robinson*, 42 Vt. 359, where it was held that the proponent was charged with the burden of proving not only the due execution of the will, but also testamentary capacity. But, if the proponent shows that the testator ever possessed such capacity, does not the presumption of the continuance of a fact come in aid of the proponent, and impose the burden upon the contestant? A contrary rule is opposed to reason as well as authority. As to the burden of proof in such cases, see *Higdon v. Higdon*, 6 J. J. Marsh. (Ky.) 48. Where a person conveyed a piece of property not worth \$50, to a railroad company, for them to construct a railroad over it, and received therefor the sum of \$1,600, it was held that this disparity between the actual value and the sum received, raises a presumption that the vendor contemplated all the damages liable to result to him from the construction of the road there, even to the danger of damage by fire; *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb. (N. Y.) 80; the law in such cases will presume that the party applied the same rules that the law would, in its appraisal; *Robeson v. Nor'n Co.*, 3 Grant's Cas. (Penn.) 186; but not such damages as arise from a careless or negligent exercise of the powers, but only such as result from a proper exercise of the franchise. A clerk having made entries of goods sold to a person, upon his employer's book, it will be presumed after his decease that he delivered

the goods charged. *Clarke v. Magruder*, 2 Harr. & J. (Md.) 77. Where, in an action against the owners of a vessel on a contract made by the master, the enrollment of the vessel purports to have been made upon the oaths of the defendants, this is, against them, evidence of ownership, and if the master is part owner, it will be presumed that the vessel was in the employ of the owners. *Hacker v. Young*, 6 N. H. 95.

Where a person carries on business in the name of another, but for his own benefit, and a person dealing with him knows the fact, it will be presumed that he gave credit to the person who claims to be agent. *Ferris v. Kilmer*, 47 Barb. (N. Y.) 411. Where a person makes a contract to deliver a quantity of grain to another, if the sacks or bags are furnished by the vendee in the absence of proof that the vendee was to furnish them, the legal presumption is that the vendor is to pay for them. *Burr v. Williams*, 23 Ark. 244. The law presumes that in the use of language in a contract the parties intended what such language by its terms ordinarily means, and this presumption cannot be rebutted by showing that they intended it to convey a different meaning. *Clark v. Lillie*, 39 Vt. 405. Where a contract for the extension of the time for the performance of a contract or the payment of a note is silent as to the time, the law will presume the extension to have been for a *reasonable* time. *Luckhardt v. Ogden*, 30 Cal. 547. The law presumes that an instrument was executed on the day it bears date, as between the parties thereto, but not as to strangers; *Sams v. Rand*, 3 C. B. (N. S.) 442; *Meldrum v. Clarke*, 1 Morris (Iowa), 130; *Dodge v. Hopkins*, 14 Wis. 630; *Smith v. Porter*, 10 Gray (Mass.), 66; and where a person indorses a note and there is no date thereto, it will be presumed to be of the same date of the note itself; *Snyder v. Colman*, 16 Ind. 265; and so of an assignment of a note; *Haywood v. Munger*, 14 Iowa, 516; *Noxon v. De Wolf*, 10 Gray (Mass.), 343; and that every person knows the legal effect of his contract. *Mears v. Graham*, 8 Blackf. (Ind.) 144; and the contents of all papers signed by him, including its date; *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 573; or signed by others by his direction; *Harris v. Story*, 2 E. D. S. (N. Y. C. P.) 363; and he is bound to know it, and has no right to rely upon the statements of others. *Clem v. R. R. Co.*, 9 Ind. 488. Thus in *Lewis v. Gt. Western Railway Co.*, 5 Hurlst. & Norm. 867, the plaintiff signed a railroad receipt for the carriage of goods which contained certain conditions which he did not read, and of which he had no knowledge. The court held that he was presumed to know, not only the contents, but the effect of the paper which he signed, and was bound to the performance of its conditions. But the rule is otherwise where fraud or duress is shown. The fact that a paper not usually sealed, as a promissory note, has a seal against the name of the maker, will raise a presumption that the maker of the note placed it there. But this is only *prima facie* proof which he may overcome by evidence. *Merritt v. Cornell*, 1 E. D. S. (N. Y. C. P.) 335. The cancellation of the names of the signers of a contract, note, or other obligation, is *prima facie* evidence that it is fully satisfied. *Pilcher v. Patrick*, 1 Stew. & Port. (Ala.) 478. When a person has been in possession of premises under a deed more than thirty years old, it may be given in evidence without proof of its execution. *Stockbridge v. West Stock-*

bridge, 14 Mass. 256; but possession of the deed alone is not sufficient; it must be followed by possession of the land; *Middleton v. Moss*, 2 N. & M. (S. C.) 55; *Jackson v. Blansham*, 3 Johns. (N. Y.) 292; *Jackson v. Davis*, 5 Cow. (N. Y.) 123; and a deed reciting a power of attorney will be presumed to have been executed under full power. *Doe v. Campbell*, 10 Johns. (N. Y.) 475; *Doe v. Phelps*, 9 id. 169. So of a will, when lands have been conveyed by one as executor. *Shaller v. Brand*, 6 Binney (Penn.), 437; *Jackson v. Blansham*, 2 Johns. (N. Y.) 292; *Maverick v. Austin*, 1 Bailey (S. C.), 59; so where lands are conveyed by one acting as the agent of another, after thirty years, the law will presume authority. *Stockbridge v. West Stockbridge*, 14 Mass. 256. So the assent to, and acceptance of the deed by the grantee to the conveyance will be presumed, when he enters into the possession of the property and deals with it as his own; *Harris v. Shirley*, 3 J. J. Marsh. 23; so the assent of the grantor to a deed, clearly for his benefit, will be presumed; yet, if there is any thing to be paid, his assent must be proved. *Hurst v. McNiel*, 1 Wash. (U. S. C. C.) 70.

Where goods are shipped to a certain person, the law presumes, in the absence of other evidence, the property therein to be in the consignee, and in an action brought in his name for the loss of, or for injury thereto, the burden of proving that he is not the owner is upon the party who attempts to rebut the presumption. *Lawrence v. Minturn*, 17 How. (U. S.) 100. Indeed, this presumption is so strong that the consignor will not be permitted to intermeddle with the goods, or stop them *in transitu*, unless the consignee is shown to have become insolvent, and that the consignor had no knowledge of such insolvency when the goods were shipped; *Eaton v. Cook*, 32 Vt. 58; *White v. Welsh*, 38 Penn. St. 396; but this presumption may be overcome by showing that the goods were in fact the property of the consignor, or that he shipped them to be sold by the consignee on his account, or that the title to the property had not passed, or any fact that shows that the property in the goods has not passed to the consignee. But, so far as the maintenance of an action for the loss of goods is concerned, it has been held wholly immaterial, as an action may be maintained by the consignor even though the title has passed to the consignee; *Hooper v. Chicago, etc., R. R. Co.*, 27 Wis. 81; 9 Am. Rep. 439; but if the title has really passed, can any recovery be had for the value of the goods? If so, does such a recovery bar an action by the consignee for the value of the goods? Is not the consignor restricted to actual damages under the contract? It seems to me that the doctrine of this case cannot be sustained. See *Thompson v. Fargo*, 49 N. Y. 188; 10 Am. Rep. 342; *Krudler v. Ellison*, 47 N. Y. 36; 7 Am. Rep. 402. An agreement to forbear arresting a person will be presumed to include criminal as well as civil proceedings. *Decker v. Morton*, 1 Hedfield (N. Y. Surrogate), 234. Where a memorandum of insurance is given to a person and a receipt for the premium, both signed by the agent of the company, it will be presumed that it is in conformity to the usual form of the policy, and a suit can be maintained on it as well as on a policy; *State, etc., Ins. Co. v. Porter*, 3 Grant's Cas. (Penn.) 123; any thing said in the presence of a person will, in the absence of proof to the contrary, be presumed to

have been said in his *hearing*. *Hochreister v. People*, N. Y. Ct. of App., N. Y. App. 363. A memorandum on the back of a receipt given to a corporation, for money paid on account, in the handwriting of one of its servants or agents, will not be presumed to have been upon the paper when it was signed, and is no evidence of itself against the person giving the receipt. *Currier v. Boston & Me. R. R. Co.*, 34 N. H. 498. Where the maker and payee in a note are of the same name, the law will presume that it is a valid contract, and that there are two persons of that name; *Cooper v. Poston*, 1 Duv. (Ky.) 92; but where the name of the grantee of land and that of a prior holder are the same, they will be presumed to be the same person. *Brown v. Metz*, 33 Ill. 339. Where the legal line between two towns differs from the line universally recognized, the presumption is that a person whose deed bounds him upon the town line, takes to the legal line; but this may be rebutted by proof to the contrary. The presumption is not absolute that parties to a deed intend to bind themselves to a line adopted by a town or town officers, which does not accord with the legal line; and where the deed is equally applicable to either, parol proof is admissible to show the intent of the parties, it being a latent ambiguity. *Putnam v. Bond*, 100 Mass. 58; 1 Am. Rep. 82. Where a note is given by one party to another, *prima facie*, this is proof of a settlement of all claims between the parties; and if the maker, in an action upon the note, pleads an account in offset, the jury will not be allowed to consider it, unless it is shown not to have been considered when the note was given; *Campbell v. Hays*, 1 Smith (Ind.), 355; *DeFreest v. Bloomington*, 5 Den. (N. Y.) 304; but this presumption may be overcome by proof; and it seems that in cases where money is paid in settlement of a suit brought for a special matter, such payment does not warrant the presumption that a debt due from the plaintiff to the defendant was settled, at the same time. Thus in *Walton v. Eldridge*, 1 Allen (Mass.), 203, it was held that where an agent paid money to his principal in settlement of a suit brought against him by the former to recover the value of property intrusted to him to be sold, it would not be presumed that the agent's claims for commissions and services were included in such settlement, even though the principal received the money with such an understanding; but that it was a question of fact for the jury, whether both parties so understood it, and whether it was so agreed, and that the burden of proof rested upon the defendant to establish such an understanding and agreement. But in such cases, where the action settled is for the amount then actually due, and the person paying the money makes no claim against the plaintiff, it is competent for the jury to presume that all matters were adjusted and settled. When a particular state of things is once shown to exist, its continuance will be presumed until the contrary appears. As, that a person who was insolvent at the maturity of a note made by him, continued so to the time when the action was brought; *Brown v. Burnham*, 28 Me. 38; *Eames v. Eames*, 41 N. H. 177; *Farr v. Payne*, 40 Vt. 615; *Ramsey v. McCauley*, 2 Texas, 189; that life continues until death is proved. *Lockhardt v. White*, 18 Texas, 102; that insanity continues when once established; *Titlow v. Titlow*, 54 Penn. St. 216; *Sprague v. Duer*, 1 Clarke's Ch. (N. Y.) 90; *Breed v. Pratt*, 18 Pick. (Mass.) 115; but not

where it is caused by violent disease. *Hix v. Whittemore*, 4 Metc. (Mass.) 545; that competency continues until incompetency is shown; *Allen v. Pub. Admr.*, 1 Bradf. Surrogate's Rep. (N. Y.) 378; that confidential relations once established, continue; *Rhodes v. Bate*, L. R., 1 Ch. App. 252; that a note once proved to exist exists still, unless payment be shown, or other circumstances creating a stronger counter presumption; *Heffner v. Henrick*, 32 Penn. St. 423; so a person is presumed to be solvent until his insolvency is proved; *Wallace v. Hull*, 28 Ga. 68. Possession of property, unexplained, is *prima facie* evidence of ownership; and if damage results to another from the use made of such property—in this case a boom across a navigable river—proof of the defendant's possession will be sufficient *prima facie* to charge him with liability. *Munson Boom Co. v. Plumer*, 35 Wis. 274. Where one has possession of property knowing that he has no rightful claim to it, and withholds it from the rightful owner, he is presumed to have assented to the wrongful act of another by which possession of the property was obtained. *Anderson v. Kincheloe*, 30 Mo. 9. So where one sells property to another upon credit, the presumption is that he believed such person to be solvent. But such presumption may be overcome by proof that he knew of the person's insolvency, or gave him credit for special reasons, and relying upon other than his personal responsibility. *O'Brien v. Norris*, 16 Md. 122. In the absence of payments made thereon, or of an acknowledgment to the contrary, a mortgage will be presumed to have been paid after the lapse of twenty years; *Ely v. Ely*, 5 Barr. (Penn.) 435; and so of any covenant or contract under seal; *Stockton v. Johnson*, 6 B. Monr. (Ky.) 409; *King v. Coulter*, 2 Grant's Cas. (Penn.) 77; *Shepard's Appeal*, id. 402; but the period of twenty years is not the measure where the statute of limitations fixes another period. *Grafton Bank v. Doe*, 19 Vt. 463. The return of an execution satisfied raises a presumption that the plaintiff received the money; *Boyd v. Foot*, 5 Bosw. (N. Y.) 110; but presumption of payment by lapse of time may be overcome by proof that shows that payment has not in fact been made, and of such a state of facts as shows that a legal liability to pay still exists. *King v. Coulter*, *ante*; *Hinsman v. Hinsman*, 7 Jones (N. C.), 510. An inquisition of lunacy is only presumptive evidence of insanity, against persons not parties thereto. *Rippy v. Gant*, 4 Ired. (N. C.) 443. Acts done by a wife, in the absence of the husband, are not presumed to have been done under coercion from him; but otherwise when he is present. *Com. v. Butler*, 1 Allen (Mass.), 4.

A vessel which has not been heard from will be presumed to have been lost after the lapse of the longest time to make such a voyage as it started on. *Oppenheim v. Leo Wolf*, 3 Sandf. Ch. (N. Y.) 571. Instruments appearing to be duly executed will be presumed valid until proved invalid. *Talbot v. Talbot*, 23 N. Y. 17. Where a person has given credit to two persons, but subsequently takes the note of one therefor, and receipts the bill, this is *prima facie* evidence that he received the note in payment of the account. *Palmer v. Priest*, Sprague (U. S.), 512. In *Robinson & Church v. Hurlburt & Miller* decided in the Supreme Court of Vermont, but not reported, the plaintiffs were druggists in the city of Troy, N. Y., and had an open account with Hurlburt &

Bros., paper manufacturers in Fairhaven, Vermont. Their dealings with this firm had run over a period of nearly two years, when the defendant Miller bought the interest of all the members of the firm of Hurlburt & Bros. but one, and the business was thereafter conducted under the name of Hurlburt & Miller. At the time of the formation of the new firm, there was due to the plaintiffs a balance of \$47.75 only, and from that time forward all goods were ordered in the name of Hurlburt & Miller. When the bill reached the sum of some \$300, one of the members of the plaintiff firm called upon the defendants for a settlement of the account. The defendants offered him the note of Hurlburt & Miller for the amount in settlement, but he declined to take it, saying that he preferred to take the note of Hurlburt alone, as he knew him, and did not know any thing about Miller. The account was settled by the note of Hurlburt and the bill receipted. Before the maturity of the note Hurlburt became insolvent, and Miller succeeded to his interest in the business, and thus became sole owner of the property. Miller in his settlement with Hurlburt paid him one-half the amount of the plaintiffs' note, which had been charged to him upon the company's books upon the day the note was given, in the regular course of business. When the note matured, the plaintiffs offered to surrender the note and brought an action upon the original account against Hurlburt & Miller; but upon these facts, the court — Redfield, J., delivering the opinion — held that the plaintiffs must be presumed to have taken the note of Hurlburt in *payment* of the account, and therefore could only rely upon the note as a ground of action.

When business relations exist between parties, or even when there is nothing to explain their relations, and payments and expenditures are made by one for the use of the other, the law will presume that they were made in the discharge of an indebtedness; but when business relations are shown *not* to exist, as where money is paid by a father for his son, or a man for his mistress, it is presumed that the money is a gift. *Swain v. Ettling*, 32 Penn. St. 486. Where an instrument not requiring a witness is signed either on the right or left hand side, it will be presumed that it is a binding and obligatory instrument as to the person signing it; but where it is an instrument requiring to be witnessed, if the name is in an equivocal position, it must be proved that it was signed and delivered as a valid agreement. *Steininger v. Hoch*, 39 Penn. St. 363. The depositing of a letter in a post-office properly directed to a person affords no presumption that the letter was received by the person, even though he lives at the place and usually receives his letters there; but the question as to whether or not he did receive it, is one of fact to be determined by the jury upon all the evidence. *Greenfield Bank v. Crofts*, 4 Allen (Mass.), 447; *Bank v. McManigle*, 69 Penn. St. 156; but see, *contra*, *Russell v. Beckley*, 4 R. I. 525, where it was held that a letter addressed to one at his place of business, and deposited in the mails, is *prima facie* evidence that it reached its destination. *Huntley v. Whittier*, 105 Mass. 391; 7 Am. Rep. 536; but see, *contra*, *National Bank of Bellefont v. McManigle*, 69 Penn. St. 156; 8 Am. Rep. 236. The question of intent is one of fact. The rule that a man intends all the reasonable and probable consequences of his acts, is only a rule of evi-

dence which may be overcome by proof; *Quinebaug Bank v. Brewster*, 35 Conn. 559; and it will not be presumed that a man has violated the law until proved, and the burden is on him who alleges it. *Horan v. Weiler*, 41 Penn. St. 410. Where the mortgagee has never entered into possession, and no demand has been made, or interest paid upon the mortgage for the statutory period, it will be presumed that the mortgage has been paid; *Jackson v. Wood*, 12 Johns. (N. Y.) 242; but the statute does not begin to run until the mortgage becomes due. When deeds showing a defective title are produced, a good title cannot be presumed. *Owings v. Norwood*, 2 Harr. & J. (Md.) 96. Where a party refuses or neglects to produce books or papers in evidence after notice to do so, all the presumptions are against him that the books or papers if produced would not sustain his theory of the case; *Cross v. Bell*, 34 N. H. 83; *Life & Fire Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. (N. Y.) 31; *Clifton v. United States*, 4 How. 242; so where one destroys the evidence of his title, all presumptions will be made against the validity of his claim, which he must overcome by proof. *Thompson v. Thompson*, 9 Ind. 323. (The holder of a promissory note is presumed to have acquired it *bona fide*, honestly and for value, and the burden of proving the contrary is upon him who alleges it;) *Garland v. Lane*, 46 N. H. 245; *Vather v. Zane*, 6 Gratt. (Va.) 246; *Gray v. Bank of Ky.*, 29 Penn. St. 365; *McCaskill v. Ballard*, 8 Rich. (S. C.) 470; *Seeley v. Engell*, 17 Barb. (N. Y.) 530; *Tucker v. Morrill*, 1 Allen (Mass.), 528; *Ross v. Drinkard*, 35 Ala. 434; *Winstead v. Davis*, 40 Miss. 485; *Perain v. Noyes*, 39 Me. 384; *Whitehead v. McAdams*, 18 Tex. 551; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Paton v. Coit*, 5 Mich. 505; *Kelly v. Ford*, 4 Iowa, 140; *Potter v. Chadney*, 16 Abb. Pr. (N. Y.) 146; *Davis v. Bartlett*, 12 Ohio St. 534; *Cain v. Spawn*, 1 McMull. (S. C.) 258; *Breckenridge v. Moore*, 3 B. Monr. (Ky.) 639; *Gwynn v. Lee*, 1 Md. 445; *Wheeler v. Maillott*, 20 La. Ann. 75; and also that it was transferred in the usual course of trade while current; *Pinkerton v. Bailey*, 8 Wend. (N. Y.) 600; *Walker v. Davis*, 33 Me. 516; *Hopkins v. Kent*, 17 Md. 113; *Noxon v. DeWolf*, 10 Gray (Mass.), 343; *DePuy v. Schuyler*, 45 Ill. 306; *Beall v. Leverett*, 32 Ga. 105; *Burnham v. Wood*, 8 N. H. 334; *Rhodes v. Alley*, 27 Tex. 443; but these presumptions may be overcome by proof that the facts are otherwise; *Blackwood v. Brown*, S. C. Mich., *Michigan Lawyer*, 5; *Garland v. Lane*, 46 N. H. 245; *Hoffman v. Foster*, 43 Penn. St. 137; *Farrington v. Bank*, 31 Barb. (N. Y.) 133; *Thompson v. Armstrong*, 7 Ala. 256; *Holden v. Cosgrove*, 12 Gray (Mass.), 216; *Chamberlain v. Gilford*, 47 Me. 135; *Benedict v. Caffé*, 5 Duer (N. Y.), 226; as that the consideration was illegal; *Garland v. Lane*, *ante*; or that there was no consideration; *Eastabrook v. Boyle*, 1 Allen (Mass.), 412; or that it is usurious; *Benedict v. Caffé*, 5 Duer (N. Y.), 226; or that the note was fraudulently obtained; *Allbrietz v. Mellon*, 37 Penn. St. 367; or that the holder had notice of certain equities in favor of the maker or indorser before the transfer; *Fay v. Blackstone*, 31 Ill. 558; but notice of such equities must be clearly proved; *Kellogg v. French*, 15 Gray (Mass.), 354; and the note or bill must be negotiable, or no presumption arises from its possession. *Blackwood v. Brown*, *Michigan Lawyer*, 5. An indorsement without date will be presumed to have been made at the date of the instrument. *Thorne v. Woodhull*, Anth.

N. P. (N. Y.) 103; *Stewart v. Smith*, 28 Ill. 397; *Haywood v. Munger*, 14 Iowa, 516; *Rhodes v. Alley*, 27 Tex. 443; *Balch v. Onion*, 4 Cush. (Mass.) 559; *Hatch v. Gilmore*, 3 La. Ann. 508; and *where* it was executed; *Hatch v. Gilmore*, 3 La. Ann. 508; and that the indorser and payee are the same person even though the middle letter is not the same. *Hunt v. Stewart*, 7 Ala. 525. The presumption of execution at the time when an instrument bears date extends to all instruments, as deeds, mortgages, etc.; *Dodge v. Hopkins*, 14 Wis. 630; *Merrill v. Dawson*, Hempst. (Tenn.) 563; *Abrams v. Pomeroy*, 13 Ill. 133; *Breck v. Cole*, 4 Sandf. (N. Y.) 79; *Meldrum v. Clark*, 1 Morr. (Iowa) 130; but an *impossible* date raises a presumption of *ante* or *post* dating, rather than of an alteration; *Davis v. Laftin*, 6 Tex. 489; particularly when the genuineness of the signature is proved, or not denied, the law in such cases presuming that the whole instrument is genuine. *Wing v. Cooper*, 37 Vt. 169.

Where a person is shown to be a wrong-doer, all presumptions respecting disputed facts are with the party injured. But where the question as to whether the defendant did the wrong is doubtful, no such presumption exists; *Costigan v. Mohawk*, etc., R. R. Co., 2 Denio (N. Y.), 609; as, where a person's house is proved to have been injured by a blast, it will be presumed that the blast was not properly covered; *Ulrich v. McCabe*, 1 Hilt. (N. Y. C. P.) 251; so where a person is injured by the fall of a building on a public-street, negligence on the part of the owner will be presumed; *St. John v. Mullin*, 57 N. Y. 567; but this rule is predicated upon the principle that a defective building in such a location is a nuisance. So where a public conveyance is overturned or broken down, it has been held that the law will imply negligence, and that the defendants take the burden of overcoming that presumption; *Ware v. Gay*, 11 Pick. (Mass.) 106; see also *Tennery v. Pippinger*, 1 Phil. (Penn.) 543; *Lyndsay v. Conn. & Pass. Riv. R. Co.*, 27 Vt. 643; *McLean v. Burbank*, 11 Minn. 277; *McMahan v. Davidson*, 12 id. 357; *Horne v. R. R. Co.*, 1 Cold. (Tenn.) 72; so where buildings are burned by sparks from an engine, the presumption is that the railroad company were negligent in its operation, or as to the condition thereof; *Lackawanna R. R. Co. v. Dank*, 52 Penn. St. 379; *Freemantle v. R. R. Co.*, 10 C. B. (N. S.) 89; *Smith v. Hannibal & St. Jo. R. R. Co.*, 37 Mo. 287; *Grigg v. Vetter*, 41 Ind. 228; *Field v. N. Y. Cent. R. R. Co.*, 32 N. Y. 339; but this presumption does not arise without *some* evidence, however slight, of negligence in fact. First, it must be proved that the fire originated by sparks from the engine, and then, it would seem to be no more than just to require — and such I believe now to be the general doctrine — the plaintiff should show that the emission of sparks, in quantities sufficient to set fire to buildings, does not take place, from engines supplied with the best spark protectors. See the opinion of Buskirk, J., in *Grigg v. Vetter*, *ante*; also the comments of Mr. Wharton in his excellent treatise on Negligence, §§ 870, 871. But it must be borne in mind that, in most of the States where the mere happening of an injury is held to be *prima facie* evidence of negligence, the decisions generally rest upon special statutes making such provision. Generally where the act is lawful in itself, and is not of a character classed as a nuisance the courts will not presume negligence from the mere happening of an injury.

Some proof, even though it be slight, must be given tending to establish it. *The Empire State*, 1 Ben. (U. S.) 57; *Smith v. First Nat. Bank*, 99 Mass. 605; *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234; *Bryne v. Boodle*, 2 H. & C. 722; *Mitchell v. Western, etc.*, R. R. Co., 30 Ga. 22. In *Danver's case*, 4 Rich. (S. C.) 329, it was held that where cattle are killed by a railroad company, in the operation of its road, the courts will *prima facie* presume negligence from the killing; and in a late case in that State, *Roof v. R. R. Co.*, 4 Rich. (S. C.) 61, decided April, 1872, the court re-affirmed the doctrine. The injury itself does not import negligence. But the burden is on the plaintiff to establish some negligence, however slight. *Button v. H. R. R. Co.*, 18 N.Y. 248; *Caldwell v. Steamboat Co.*, 47 id. 282; *Curran v. Warren Mfg. Co.*, 16 id. 153; *Holbrook v. R. R. Co.*, 12 id. 236; *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234. But when buildings are fired by sparks from an engine, the law presumes that the engine was defective, and the burden is on the defendant to show that it is not in fault. *Case v. R. R. Co.*, 59 Barb. (N. Y.) 644; *Sheldon v. R. R. Co.*, 14 N. Y. 218.

In an action for negligence in burning a fallow the burden is on the plaintiff; *Sturgis v. Robbins*, 62 Me. 289; and so as to negligence generally; *Plantation No. 4 v. Hall*, 61 Me. 517; and this extends not only to showing fault on the part of the defendant, but also to want of contributory negligence on the part of the plaintiff. *Michigan Cent. R. R. Co. v. Coleman*, 28 Mich. 440. The law will not presume negligence without *some* proof of it; *Lyndsay v. Conn. & Pass. R. R. Co.*, 27 Vt. 679; and so where one is injured on a highway over which he had frequently passed; *Kavanaugh v. Janesville*, 24 Wis. 618; but where the testimony is balanced, from the tendency of men to avoid injury, the law will sometimes infer the absence of fault on the part of a person injured; *Northern Cent. R. R. Co. v. State*, 31 Md. 357; and negligence may be presumed on the part of railroads when passengers are injured under circumstances indicating want of care; *Brehm v. Gt. Westn. R. R. Co.*, 34 Barb. (N. Y.) 256; *Edgerton v. N. Y., etc.*, R. R. Co., 35 id. 193; but when the accident might arise from some cause which the company could not guard against, no presumption of negligence can be raised; *Reed v. N. Y. Cent. R. R. Co.*, 56 Barb. (N. Y.) 493; and a person's acts, in the absence of proof, are never presumed to be wrongful, but on the contrary, they are presumed to be lawful, until proved to be otherwise. Thus, where licenses are granted for that purpose, in actions in which the question becomes material, it will be presumed that a person engaged in the sale of liquors has a license therefor. *Timson v. Moulton*, 3 Cush. (Mass.) 269. Where an injury arises to a passenger from the collision of trains, the running of cars off the track, or from being thrown down an embankment by the sudden washing away of its road-bed, or injuries resulting from broken rails, defective coaches or machinery, misplaced switches or any species or cause of a similar character, the law will presume negligence and throw the burden of proving that the accident could not have been prevented, by any reasonable care or foresight upon its part, upon the company. *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Brehm v. Gt. Westn. R. R. Co.*, 34 Barb. (N. Y.) 256; *Edgerton v. N. Y., etc.*,

R. R. Co., 35 id. 389; *Brignoli v. Gt. Eastern R. R. Co.*, 4 Daly (N. Y. C. P.), 182; *Virginia Cent. R. R. Co. v. Sanger*, 15 Gratt. (Va.) 230; *Pittsburgh, etc., R. R. Co. v. Thompson*, 56 Ill. 138; *Holyoke v. Gd. Trunk R. R. Co.*, 48 N. H. 541; *Reed v. N. Y. Cent. R. R. Co.*, 56 Barb. (N. Y.) 493. As to machinery, they are bound to use the highest care, and to employ the best machinery known, and their coaches must not be defective in strength or construction; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Alden v. N. Y. Cent. R. R. Co.*, 26 id. 102; as to broken rails; *Reed v. N. Y. Cent. R. R. Co.*, *ante*; *R. R. Co. v. Lantz*, 29 Ind. 528; *Matteson v. N. Y. Cent. R. R. Co.*, 35 N. Y. 487; also, 62 Barb. (N. Y. S. C.) 364; defective road-beds; *Curtis v. Rochester & Syracuse R. R. Co.*, 18 Barb. (N. Y. S. C.) 534; 20 N. Y. 282; running against cattle or other obstacles on the track, expecting to remove them; *Willis v. L. I. R. R. Co.*, 34 N. Y. 676; but where the injury results to a passenger in getting on or off the cars, or at a railway station, the plaintiff is bound to show, not only that the company was negligent, but also that he was himself free from fault that contributed to the accident; *Michigan Cent. R. R. Co. v. Coleman*, 28 Mich. 440; *Meir v. Penn. R. R. Co.*, 64 Penn. St. 225; so where there are no circumstances connected with the accident itself, indicating a want of care, and it might have resulted from causes over which the company had no control, as where a rail is maliciously misplaced by some person, or obstructions are thrown in front of a passing train, the fastenings of rails withdrawn or from any cause of that character, negligence will not only not be presumed, but full proof of negligence will be required; *Reed v. N. Y. Cent. R. R. Co.*, 56 Barb. (N. Y.) 493; the plaintiff must show *some* fault; *Terry v. N. Y. Cent. R. R. Co.*, 22 Barb. (N. Y.) 574; *Buel v. N. Y. Cent. R. R. Co.*, 31 N. Y. 314; but the *slightest* negligence will be sufficient when the passenger was free from fault. *Meir v. Penn. R. R. Co.*, 64 Penn. St. 225; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Huelsenkamp v. Citizens' R. R. Co.*, 37 Mo. 537; *Brown v. N. Y. C. R. R. Co.*, 34 N. Y. 404; *Taylor v. Gd. Trunk R. R. Co.*, 48 N. H. 304; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228; *Western R. R. Co. v. Budleigh*, 54 Ill. 19; *Johnson v. Winona, etc., R. R. Co.*, 11 Minn. 296. So where accidents result to a person while upon the track, or crossing it, negligence will not be presumed, unless the train is shown to have been running contrary to the provisions of a positive law; and even in those cases, the plaintiff must show that he is himself free from fault; as that he stopped and looked or listened for an approaching train before he entered upon the track, and exercised in that respect all the caution that an ordinarily prudent man would exercise under similar circumstances. But where the person was killed, and no evidence of that kind can be had, the law will presume freedom from fault on the part of the person injured, from the instinctive tendency of people to avoid injury to themselves, if there is any evidence tending to show fault on the part of the company, as that it did not give the proper signals, or was running at an unusual or unlawful rate of speed, or by the exercise of proper watchfulness or caution on the part of the engineer, the injury might have been avoided. *Northern Cent. R. R. Co. v. State*, 31 Md. 357; *Marshall v. R. R. Co.*, decided in Sup. Ct. of

Vt., but not reported; *Wilcox v. Rome, Watertown & Ogdensburgh R. R. Co.*, 39 N. Y. 358; *Baxter v. Troy, etc., R. R. Co.*, 41 id. 502.

The rule in reference to railroad companies is predicated upon a principle entirely different from that applicable to individuals. Railroads, except for the authority conferred upon them by the legislature, would be nuisances *per se*; therefore the courts hold them up to the strictest liability, as they ought to do. They are bound to use the utmost care that human diligence and prudence suggest to prevent injury. They *must* use the best and most improved machinery, and, employing it, must use it in the ordinary modes in which such machinery is used. The law raises an obligation on their part not to put passengers in more jeopardy than is ordinarily incident to such transit, and where human foresight could have guarded against the injury they must respond in damages. *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33; *Meir v. Penn. R. R. Co.*, *ante*; *Fuller v. R. R. Co.*, *ante*. The rule is that lands are presumed to be public until a grant from the government is shown. Therefore a miner working upon such lands is presumed not to be a trespasser, until a sale of the *locus in quo* by the government is shown; and such presumption is not overcome by the general presumption of ownership in favor of a farmer who occupied the premises before the miner entered upon them. *Burge v. Smith*, 14 Cal. 380.

Illegality is never presumed. Every person is presumed in the first instance to act honestly and according to law; but when the illegal character of the act is once established this presumption is overcome, and the law will presume that the act was done willfully, and with intent to evade the law. *Hatch v. Brewster*, 53 Barb. (N. Y.) 276; *Howe v. Carpenter*, id. 382. Thus, when a note is transferred before suit brought, it will not be presumed to have been done for illegal purposes; *Hatch v. Brewster*, *ante*; but where the person transferring it is insolvent, and the transfer is made to a relative or friend without consideration, it will be presumed that the transfer was made with a fraudulent and illegal intent; *Bennett v. McGuire*, 53 Barb. (N. Y.) 625; so where property subject to a revenue tax is sold for less than the amount of the tax, this is *primâ facie* evidence that the tax has not been paid, and the intent to evade the tax may, from such fact, be presumed. *Kessell v. Albertis*, 56 Barb. (N. Y.) 362. Where a person is injured by the explosion of a steam-boiler while a passenger upon a steamboat, proof of the mere fact of the explosion and injury is *primâ facie* sufficient, the defendant being bound to show that the explosion resulted from causes that human care, foresight and skill could not have prevented; *Caldwell v. N. J. Steamboat Co.*, 56 Barb. (N. Y.) 425; so where a vessel sinks in ordinary sea-going weather, without any extraneous cause, it will be presumed that she was unseaworthy from some inherent defect or decay, and that she was in that condition when she left port. *Sturm v. Gt. Westn. Ins. Co.*, 40 How. Pr. (N. Y.) 423. Quære, will not this depend upon the length of time that has elapsed since she left port? When a person acting in a double capacity, as special and general guardian, sells property as a special guardian and receives the money therefor, he will be presumed to receive the money in the character of special guardian, until the contrary is proved. *Swartwout v. Oaks*, 52 Barb. (N. Y.) 622. A deed will be

presumed to have been delivered on the day it bears date, even though not acknowledged until afterward; *People v. Snyder*, 41 N. Y. 397; but when the revenue stamps are not canceled until a subsequent date, it will be presumed that the delivery did not take place until the date of their cancellation; the presumption of delivery, at the date of execution, being overcome by the presumption that the parties acted according to law. *Van Rensselaer v. Vickery*, 3 Lans. (N. Y.) 57.

When a person sells property to another, and simultaneously with its sale and delivery receives the note of a third person therefor from the vendee, it will, in the absence of proof to the contrary, be presumed that the note was taken in payment for the property, and at the risk of the vendor. *Gibson v. Toby et al.*, 53 Barb. (N. Y.) 191. The mere possession by the payee of a note payable in installments, and specific articles at a fixed price, does not raise a presumption that the note has not been paid, but the plaintiff is bound to show non-payment in order to entitle him to a recovery. *Jones v. Dimmock*, 2 Mich. (N. P.) 87. This case proceeds upon the ground that such a note is a contract which imposes upon the holder the burden of proving non-performance before he can recover. In all cases where a note is payable in money, and is *due*, the bare production of the note makes a *prima facie* case, and if the defendant relies upon payment as a defense, he must both plead and establish it; *McKinney v. Slack*, 19 N. J. 164; *Witherell v. Swan*, 32 Me. 247; *Buzzell v. Snell*, 25 N. H. 474; *Irwin v. Gernon*, 18 La. Ann. 228; and so of a mortgage; *Crooker v. Crooker*, 49 Me. 416; or a bond or any specialty; *Stockton v. Johnson*, 6 B. Monr. (Ky.) 409; but lapse of time, as the statutory period, without demand, will not authorize a presumption of payment. *Ely v. Ely*, 5 Penn. St. 435; *Jackson v. Wood*, 12 Johns. (N. Y.) 242; *Lyon v. Chase*, 51 Barb. (N. Y.) 13.

So under peculiar circumstances the jury may presume the payment of a bond, mortgage or other specialty after the lapse of a less time than twenty years; *Dennison v. McKeen*, 2 McLean (U. S.), 253; as where the instrument is in the possession of the obligor; *Gray v. Gray*, 2 Lans. (N. Y.) 173; *Carroll v. Bovin*, 7 Gill. (Md.) 34; *Boyd v. Harris*, 2 Md. (Ch.) 210; *Inches v. Leonard*, 10 Pick. (Mass.) 378; or where the party is in possession of property, possession of which was not to be taken until payment was made. *Downs v. Scott*, 3 La. Ann. 278. But the presumption of payment may be overcome even after the lapse of twenty years by less evidence than would be required to take the case out of the statute of limitations. *Severs v. Van Buskirk*, 7 Watts. & S. (Penn.) 70. The presumption of payment arising from the lapse of time is essentially different from the one interposed by the Statute of Limitations. The statutory bar is not removed by any thing short of a new promise or an acknowledgment of the debt, as provided by the statutes of the several States, while the presumption of payment is overcome by proof merely that the debt is not paid. The proof is sufficient to overcome the presumption, when it establishes the existence of the debt and its non-payment. *Morrison v. Funk*, 11 Harris (Penn.), 421; *King's Exr. v. Coulter's Exr.*, 2 Grant (Penn.), 77; *Eby v. Eby's Assignees*, 5 Barr. (Penn.) 435. In *Reed v. Reed*, 46 Penn.

St. 242, Strong, J., thus defines the distinction: "That presumption which the law raises after the lapse of twenty years, that a bond or specialty has been paid, is in its nature essentially different from the bar interposed by the statute to the recovery of a simple contract debt. The latter is a prohibition of the action, the former, *primâ facie*, obliterates the debt. The bar (statutory) is substantially removed by nothing less than a promise to pay, or an acknowledgment consistent with such a promise. The presumption is rebutted, or, to speak more accurately, does not arise where there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor. * * * The presumption has no other effect than to change the *onus* of proof upon the creditor, instead of the debtor. Within twenty years the law presumes the debt to have remained unpaid, and throws the burden of proving payment upon the debtor. After twenty years the creditor is bound to show, by something more than his bond, that the debt has not been paid, and this he may do, because the presumption raises only a *primâ facie* case against him. It must be remembered that the presumption from the lapse of time is not that there is no contract existing between the parties. If it were, proof of a new contract might be necessary. It is only an inference that the debtor has done something to discharge the debt, to wit, that payment has been made; and the facts being established, whether they are sufficient to rebut it is a question for the court, and not the jury. The presumption is one drawn by the law itself from a given state of facts, and whether it exists or not is necessarily for the court." *Delaney v. Robinson*, 2 Whart. (Penn.) 503.

Evidence of the defendant's property and insolvency tends to rebut this presumption; *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536; or any evidence explaining and excusing delay in asserting the claim. *McLellan v. Crofton*, 6 Me. 307. The indorsement of a sum as paid upon an obligation within twenty years is not sufficient to overcome the presumption of payment arising from the lapse of time, unless it was made with the *consent* and *knowledge* of the payee, or under such circumstances that they can fairly be implied. *Cremers' Estate*, 5 W. & S. (Penn.) 331; *Kirkpatrick v. Lamphier*, 1 Cranch (U. S.), 85. Where manufactured articles are sold for a specific purpose, as a machine, and it does not work well, the presumption is that the fault is in the machine, and the burden is upon the vendor to overcome this presumption. *Parker v. Hendrey*, 3 Iowa, 263. Where a person carries on business in the name of another, but really for his own benefit, a party selling goods to him, with knowledge of this fact, will be presumed to have given credit to him. *Ferris v. Kilmer*, 47 Barb. (N. Y.) 411.

I have given these illustrations of special instances in which courts have held that a certain state of facts warranted certain presumptions, to show the importance, the *necessity* even, for a thorough knowledge, on the part of lawyers, of the whole doctrine of presumptions. Many cases are lost, simply because the attorney conducting them fails to assert and insist upon the legal force of presumptions raised in his favor by a given state of facts. No practi-

Founded on the relations in which parties stand to each other.

§ 428. Several presumptions are founded on the relations in which parties stand to each other. Thus, a woman who commits felony, or perhaps misdemeanor, in company with her husband, is excused, on the presumption (which, however, may be rebutted) of her having acted under his coercion.¹ But the rule does not extend to crimes which are mala in se, nor to such as are heinous in their character, or dangerous in their consequences.² Encroachments made by a tenant are considered as annexed to his holding, unless it appears clearly that he intended them for his own benefit, and not to hold them as he held the farm to which they are adjacent.³ It is also a maxim, "In præsumptione legis, judicium redditur in invitum."⁴

In contracts.

§ 429. In the case of contracts between individuals, there are many presumptions of law based on policy and general convenience. Thus, it is a conclusive presumption of law that an instrument under seal has been given

¹ See the authorities collected in Arch. Plead. Crim. pp. 18, 19, 15th Ed.; Roscoe's Cr. Evid. 937-939, 5th Ed.

² Id.

³ *Doe d. Lewis v. Rees*, 6 C. & P. 610; *Doe d. The Earl of Dunraven v. Williams*, 7 C. & P. 332; *Andrews v. Hailes*, 2 E. & B. 349; *Doe d. Croft v. Tidbury*, 14 C. B. 304; *Kingsmill v. Millard*, 11 Exch. 313; *Earl of Lisburne v. Davies*, L. Rep., 1 C. P. 259.

⁴ Co. Litt. 248 b; 5 Co. 28 b; 10 Co. 94 b. See *infra*, chap. 9.

tioner can be an accomplished or skillful lawyer unless he studies this branch of the law thoroughly and understands it fully. It is the key to complete success. If more attention was given to it, cases would be better tried, and results would be more satisfactory.

for consideration; and this presumption can only be removed by impeaching the instrument for fraud.¹ (a) But there is a remarkable exception to this rule, *i. e.*, where an instrument under seal operates in restraint of trade, in which case a real consideration must appear.² So, although in the case of contracts not under seal a consideration is not in general presumed,³ it is otherwise in the case of bills of exchange and promissory notes.⁴

¹ Bk. 2, pt. 2, § 220.

² See Chitty on Cont. 8th Ed. 615, where most of the cases are referred to.

³ *Rann v. Hughes*, 7 T. R. 350, note.

⁴ *Suprà*, sect. 1, sub-sect. 1, § 314.

(a) A bond or other instrument under seal is *prima facie* evidence of a consideration; and in an action thereon the burden of proving a want of consideration is upon him who alleges it. *Dickson v. Books*, 11 Ark. 307. But when such a state of facts is proved as tend to show that there was in fact no consideration, as that the person in whose favor the bond was given was the concubine of the obligor, the burden is shifted to the plaintiff. But the facts proved must be such as raise a fair presumption that there was no legal consideration; *Succession of Beard*, 14 La. Ann. 121; and in equity, in an action upon a bond, the burden is upon the plaintiff to show how much is due upon the bond. *Gowan v. Newell*, 2 Me. 13; *Vichte v. Brownell*, 8 Paige's Ch. (N. Y.) 212. Neither is the statement of a specific consideration in a deed, in equity, regarded as conclusive, but where fraud is shown, it may be set aside. *Kennedy v. Kennedy*, 2 Ala. 571. The consideration of a deed or mortgage may be shown to be illegal, but the burden of establishing such illegality is upon him who asserts it; *Trott v. Irish*, 1 Allen (Mass.), 481; and it is held that it may be shown that there was no consideration for a deed; *Estabrook v. Smith*, 6 Gray (Mass.), 572; *Groesbeck v. Seeley*, 13 Mich. 329; *Andrews v. Andrews*, 12 Ind. 348; *Clark v. Houghton*, 12 Gray (Mass.), 38; and a creditor or subsequent purchaser of the grantor may show that a deed expressed to be for a valuable consideration was intended as a mere gift; *Peck v. Vandenberg*, 30 Cal. 11; *Johnson v. Taylor*, 4 Dev. (N. C.) 355; *Myers v. Peck*, 2 Ala. 648; *Gelpcke v. Blake*, 19 Iowa, 263; or it may be shown to have been a mere advancement; *Gordon v. Gordon*, 1 Metc. (Ky.) 285; or that the consideration was less or different from that expressed. *McKinster v. Babcock*, 26 N. Y. 378; *Foster v. Reynolds*, 38 Mo. 553; *Fitzner v. Baldwin*, 11 Minn. 150; *Abbott v. Marshall*, 48 Me. 44.

*Affecting common carriers — Affecting innkeepers —
Maxim.*

§ 430. Where goods intrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the Queen's enemies, it is a *præsumptio juris et de jure* that they were lost by negligence, fraud or connivance on his part.¹ (a) By the act of God is meant storms, lightning, floods, earthquakes, and such other things as cannot happen by the intervention of man;² and under the head of the Queen's enemies must be understood public enemies, with whom the *nation is at open war;³ so that robbery by a mob, irresistible from their number, would be no [* 543] excuse for the bailee.⁴ This is an extremely severe presumption, but one which public policy appears to

¹ Bull. N. P. 70, n. (a); *Palmer v. The Grand Junction Railway Company*, 4 M. & W. 749, &c.

² Bull. N. P. 70, n. (a).

³ Story, Bailm. § 489, 5th Ed.

⁴ *Coggs v. Bernard*, 2 L. Raym. 909, 918, per Holt, C. J.

(a) *Shaw v. Gardner*, 12 Gray (Mass.), 488; *Steamer Niagara v. Cordes*, 21 How. (U. S.) 7; *Humphrey v. Switzer*, 11 La. Ann. 320; *Buffitt v. Troy, etc.*, R. R. Co., 36 Barb. (N. Y.) 420; *Tarbox v. Eastern Steamboat Company*, 50 Me. 339; *Howe v. Oswego, etc.*, R. R. Co., 56 Barb. (N. Y.) 121; *The Maggie Hammond*, 9 Wall. (U. S.) 435. He is bound at his peril to know the condition of his vessel or other vehicle, and the owner is not presumed or bound to know any thing relative thereto; *The Northern Belle*, 9 Wall. (U. S.) 526; and nothing will excuse him but the causes stipulated in the bill of lading; *The Maggie Hammond, ante*; *Caldwell v. N. J. Steamboat Co.*, 56 Barb. (N. Y.) 425; *Tysen v. Moore*, id. 442; *Pitts v. Offut*, 21 La. Ann. 679; *Pierce v. Milwaukee R. R. Co.*, 23 Wis. 387; *Lamb v. Camden, etc.*, R. R. Co., 2 Daly (N. Y. C. P.), 454; and even exceptions in the bill of lading will not excuse for loss or injury resulting from want of due care; *Simon v. The Fung Shuey*, 21 La. Ann. 363; *Ex. Co. v. Kauntze*, 8 Wall. (U. S.) 342; and they cannot by special contract stipulate not to be liable for negligence; such contracts are against public policy. *Indianapolis R. R. Co. v. Allen*, 31 Ind. 394.

require ; although both by the common law, and by virtue of various modern statutes, common carriers can, in many cases, limit their liability.¹ So, in the case of innkeepers, before the 26 and 27 Vict. c. 41 — which has considerably modified their liability — where the goods of a traveler brought into an inn were lost, it was presumed to be through negligence in the innkeeper ; and the law cast on him the onus of rebutting this presumption.² “Rigorous as this law” (*i. e.*, the law respecting innkeepers) “may seem,” says Sir William Jones,³ “and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield ; for travelers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them.” In this, as in many other instances of legal presumption, we may detect the application of the maxim “*Multa in jure communi contra rationem disputandi, pro communi utilitate introducta sunt*”⁴ (*a*).

¹ See 11 Geo. 4 & 1 Will. 4, c. 68 ; 17 & 18 Vict. c. 31 ; also Story, Bailm. §§ 558 *et seq.*

² Story, Bailm. §§ 472, 473, 5th Ed. ; *Armistead v. Wilde*, 17 Q. B. 261 ; *Cashill v. Wright*, 6 E. & B. 891.

³ Jones on Bailments, 95, 96, 4th Ed.

⁴ Co. Litt. 70 b.

(*a*) Innkeepers are liable to their guests for the loss of any kind of personal property brought to the inn ; *Kellogg v. Sweeny*, 1 Lans. (N. Y.) 397 ; but the relation of landlord and guest must exist ; *Wilkins v. Earle*, 44 N. Y. 172 ;

[* 544]

* SECTION III.

PRESUMPTIONS AND PRESUMPTIVE EVIDENCE IN CRIMINAL
LAW.*Design of this section.*

§ 431. The subject of presumptions and presumptive evidence in criminal law requires a separate consideration. In the present section we accordingly propose to treat,

1. Presumptions in criminal law.
2. Presumptive proof in criminal cases.
3. The principal forms of inculpatory presumptive evidence in criminal proceedings.

Cady v. McDowell, 1 Lans. (N. Y.) 484; and a townsman or neighbor may be a guest as well as persons from abroad; Walling v. Potter, 35 Conn. 183; so one may be a guest who simply goes to an inn and purchases liquor; Houser v. Tully, 62 Penn. St. 92; so one may be a guest who is not at the inn in person, if he has property there in the charge of members of his family or of servants. Mowers v. Fethers, 6 Lans. (N. Y.) 147; Murray v. Clark, 2 Daly (N. Y. C. P.), 102; Coykendall v. Eaton, 55 Barb. (N. Y.) 188. But a boarder for a term is not a guest within the rule. Vance v. Throckmorton, 5 Bush (Ky.), 41. And an innkeeper is liable for the safe-keeping of baggage left in his custody by a departing guest for a reasonable time. Adams v. Clem, 41 Ga. 65. But a clerk of a hotel cannot, unless authorized to do so, bind his employer for the safe-keeping of property of a guest after the relation of guest has ceased; Coykendall v. Eaton, *ante*; and is liable for losses by theft, even though the guest is provided with a key, but neglects to lock his door; Clason v. Leopold, 1 Sweeny (N. Y.), 705; and even though the loss would not have resulted if certain rules had been observed by the guest; Krohn v. Sweeney, 2 Daly (N. Y.), 200; Bordwell v. Bragg, 29 Iowa, 232; but see Fuller v. Coats, 18 Ohio St. 43; Kellogg v. Sweeny, 1 Lans. (N. Y.) 397; 46 N. Y. 291; but he is not liable for property intrusted by one guest to the custody of another; Houser v. Tully, 62 Penn. St. 92; but he is liable for losses resulting either from the dishonesty or incompetency of his servants; Rockwell v. Proctor, 39 Ga. 105; and even for an assault committed by a servant upon a guest, even though he is not present. Wade v. Thayer, 40 Cal. 578.

SUB-SECTION I.

PRESUMPTION IN CRIMINAL LAW.

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Legal presumptions in criminal jurisprudence.

§ 432. The introduction of legal presumptions into criminal jurisprudence presents a question of some difficulty. Although no person ought to be condemned in a court of justice unless the tribunal really and actually believes in his guilt, yet even here the principle of legal presumption may, with due discretion, be advantageously resorted to for the protection alike of the community and the accused. And accordingly we find that not only are the general presumptions of law recognized in criminal jurisprudence, but that it has peculiar presumptions of *its own. The universal presumption of acquaintance with the penal law,¹ and the maxim [* 545] "res judicata pro veritate accipitur,"² exist there in full force. Ignorance of any law which has been duly promulgated cannot be pleaded in a criminal court; and a person who has once been tried for an offense, under circumstances where his safety was in jeopardy by the proceedings, cannot, if acquitted, be tried again for that offense, whatever new arguments to prove his guilt may

¹ Introd. part 2, § 45, and *suprà*, sect. 2, sub-sect. 1.

² Introd. part 2, § 44, and *infra*. ch. 9.

be discovered, or whatever fresh proofs of it may come to light.

Criminal intent presumed from certain acts.

§ 433. A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation. When, for instance, a party is proved to have laid poison for another, or to have deliberately struck at him with a deadly weapon, or to have knowingly discharged loaded fire-arms at him, it would be absurd to require the prosecutor to show that he intended death or bodily harm to that person. So, where a baker delivered adulterated bread for the use of a public asylum, it was held unnecessary to allege that he intended it to be eaten, as the law would imply that from the delivery.¹ The setting fire to a building is evidence of an intent to injure the owner, although no motive for the act be shown;² and the uttering a forged document is conclusive of an intent to defraud the person who would naturally be affected by it, which inference is not removed by that party swearing that he believes the accused had no such intention.³ By 24 & 25 Vict. c. 98, s. 44, which replaces with amendments the former statute 14 & 15 Vict. c. 100, s. 8, it *is enacted, that “it shall be suffi-
[* 546] cient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person ; and on the trial of any

¹ *R. v. Dixon*, 3 Mau. & S. 11.

² *R. v. Farrington*, R. & R. C. C. 207.

³ *R. v. Sheppard*, R. & R. C. C. 169. See, also, *R. v. Mazagora*, Id. 291 ; *R. v. Nash*, 2 Den. C. C. 493.

such offense it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." Where a party deliberately publishes defamatory matter, malice will be presumed.¹ In such cases *res ipsa in se dolum habet*²—the facts speak for themselves. Presumptions of this kind are so conformable to reason, that moral conviction and legal intentment are here in perfect harmony. But the safety of society, joined to the difficulty of proving psychological facts,³ renders imperatively necessary a presumption which may seem severe, viz.: that which casts on the accused the onus of justifying or explaining certain acts *prima facie* illegal. It is partly on this principle that sanity is presumed in preference to innocence.⁴ So, a party who is proved to have killed another is presumed, in the first instance, to have done it maliciously, or at least unjustifiably; and, consequently, all circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him.⁵(a)

¹ *Haire v. Wilson*, 9 B. & C. 643.

² *Bonnier, Traité des Preuves*, §§ 676, 677.

³ "Comen erudition est que l'entent d'un home ne serra trie, car le Diable n'ad conusance de l'entent de home;" per Brian, C. J., P. 17 Ed. IV. 2 A. pl. 2. See, however, that case.

⁴ 2 Ev. Poth. 332; Answer of the Judges to the House of Lords, 8 Scott, N. R. 595, 601; 1 Car. & K. 134, 135. See *suprà*, sect. 1, sub-sect. 3, § 332.

⁵ *Fost. Cr. Law*, 255, 290. It may be a question, whether this presumption holds in cases of suicide, where the only fact established before a coroner's jury is that the deceased put a period to his own existence, and there is no evidence as to the state of his mind at the time. The following reasons seem to show

(a) *Witt v. State*, 6 Cold. (Tenn.) 5; *Warner v. State*, 4 id. 130; *Washington v. State*, 36 Ga. 222; *State v. Fulkerson*, Phill. (N. C.) 233. Thus it was held in *Com. v. Brown*, 13 Mass. 359, that if one advises another to commit suicide, and through the influence of the advice he does it, the person advising it is

Criminal intent transferred from one act to another.

[* 547] * § 434. A criminal intent is sometimes transferred by law from one act to another, the maxim being "In criminalibus sufficit generalis malitia intentionis cum facto paris gradus."¹ (a) A., maliciously

that the presumption does not apply in such cases. First, the *principle* fails. The presumption of malice from slaying is only a rebuttable presumption, adopted on the ground that to call on a *living* person to justify a homicide may be very advisable on grounds of public policy, and can work no hardship to the accused; an argument wholly inapplicable to the case of a person who, being no more, cannot be called on to justify or explain any thing. Secondly, presumptions ought to be based on what usually and generally exists. In many, probably most, cases of suicide, mental alienation, in some form or other, is present; in murder it is quite otherwise. Thirdly, the man who commits murder under the impression that he may do so with impunity, has only moral and religious feelings to subdue; he who destroys himself has also to struggle against the primary law of nature — self-preservation. And lastly, there seems no good reason why the law should in this case lose sight of its own maxim, "Nemo præsuntur esse immemor suæ æternæ salutis, et maximè in articulo mortis." (6 Co. 76 a.) The laws of some countries, we believe, have established it as a præsumptio juris et de jure that all suicides are insane.

¹ Bacon Max. Law Reg. 15. See also 3 Inst. 51.

guilty of murder, and the law will presume, until the contrary is shown, that the advice had the effect intended, and that degree of malice requisite to establish the crime.

It is not necessary to show a particular malice against the deceased. If the killing is without justification or mitigating circumstances, the law implies malice. *United States v. Ross*, 1 Gallison (U. S.), 624.

But where the circumstances of the killing are such as to rebut all presumptions of malice, the killing is not murder. Thus it is held, that if a person pretending to be a physician, although ignorant of medical science, in good faith administers a drug to his patient without knowing its effect or poisonous qualities, he is guilty neither of murder nor manslaughter, unless he has so much knowledge or probable information of the fatal qualities of the drug as to raise a presumption of obstinate, willful rashness. But if he has opportunity to know these facts, and then administers it, he may be convicted of manslaughter, although he did not intend any harm.

(a) If A lays poison in a certain place with the expectation that B will take it, and for the purpose of producing B's death, and C takes it, although A had no design upon the life of C, and no intention of producing his death, it is murder, precisely the same as though B had taken it. *State v. Fulkerson*,

discharging a gun at B., kills C., A. is guilty of murder, for the malice is transferred from B. to C.¹ And the same holds where poison laid by A. for B. is accidentally

¹ 1 East P. C. 230; *R. v. Smith*, 1 Dears. C. C. 559.

Phill. (N. C.) 233. While it is true that malice is an essential element in the crime of murder, yet it is not necessarily confined to the taking of the life of the particular person who was actually killed; but it includes as well an intention to do an unlawful act which may result in depriving that person of his life, and the law will imply malice from such a killing, as much as from one in which the person killed was the one against whom the blow or shot was aimed. *Warren v. State*, 4 Cold. (Tenn.) 130; *Washington v. State*, 36 Ga. 222; *Witt v. State*, 6 Cold. (Tenn.) 5. That premeditation which is essential to constitute the crime of murder, the design to take life, need not be the result of long deliberation. It may be conceived and executed in the same instant, or the same second; length of time not being of the essence of design, or premeditation. *Lewis v. State*, 3 Head (Tenn.), 127; *Lanergan v. People*, 50 Barb. (N. Y.) 266; *People v. Sheehan*, 49 id. 217; *McAdams v. State*, 25 Ark. 405. And the law will imply malice from the killing in *all* cases, unless the act was accompanied with that *indicia* which renders such a presumption impossible. Thus, in *State v. Benham*, 23 Iowa, 154, the respondent pointed a loaded gun at the deceased, under circumstances that did not justify the act, and the deceased seized hold of the gun and attempted to wrench it away from the respondent. In the progress of the struggle, the gun was discharged and the person at whom the gun was originally aimed was killed. The actual discharge of the gun, which produced his death was accidental; but the court held that there was sufficient evidence of malice and premeditation on the part of the respondent to justify his conviction for murder; for, although the ultimate shooting that produced the death was accidental, yet it was a legitimate result of the original wrongful act, which was without justification or excuse. So in *Lee v. State*, 1 Cold. (Tenn.) 62, the respondent was driving a carriage along a highway, and saw a child in the road whom he would run over unless he stopped. He did not stop, but drove over the child, the horse going at a moderate pace, and the child was killed. The court held that the respondent was guilty of murder, and that malice would be presumed from his acts, although he did not expect to kill the child by such act. Strictly speaking, malice does not necessarily mean spite or hatred. These elements however may both exist; so too there may be an entire absence of both; the law recognizes those acts as malicious that are wrongful in themselves, calculated, if carried out, to do injury to another, and which are without justification or excuse. Therefore, where a person under such circumstances assaults another with a deadly weapon, as a loaded gun, an axe, a knife, or any instrument a blow from which is likely to produce death, the law will presume malice, although there is no specific intention to

taken by C.¹ (a) It is on this principle that a party who accidentally kills himself in the attempt to murder another is deemed *felo de se*.²

¹ Plowd. 474; 1 East, P. C. 230.

² 1 Hale, P. C. 413; 1 East, P. C. 230.

(a) *Rex v. Oneby*, 2 Ld. Raym. 1489; *Rex v. Smith, Dearls*, 559; *Wood's Inst.* 307.

kill the person attacked. And, in determining this question, the nature of the weapon, and all the circumstances surrounding the transaction, may and should be considered. *State v. Decklotts*, 19 Iowa, 447; *Kriel v. Cain*, 5 Bush (Ky.), 362; *State v. Avery*, 64 N. C. 608; *Brooks v. Com.*, 61 Penn. St. 352; *McAdams v. State*, 25 Ark. 405; *Clum v. State*, 31 Ind. 480; *Murphy v. State*, *id.* 571. In all cases of killing, it being proved that the prisoner inflicted the mortal wound, the law implies malice, and it devolves upon the prisoner to show justification, mitigation or excuse for the act, if he can. *State v. Willis*, 63 N. C. 26, *Com. v. Drum*, 58 Penn. St. 9; *Murphy v. People*, 37 Ill. 447. This he may do by showing that he was first attacked, and that the act was done in necessary self-defense. *Patterson v. People*, 46 Barb. (N. Y.) 625.

It is not necessary, in order to justify a person in taking the life of another, that his life should actually have been put in peril. It is sufficient if the conduct and acts of the deceased were such as to excite apprehension of danger to his life, in the mind of a reasonable man. All the circumstances attendant upon the act are to be taken into consideration in determining this question. If threats have been made against his life by the deceased, this may be shown; so the character of the deceased, the fact that he was armed, indeed all that was said and done by him upon the occasion, may be shown as bearing upon the question. So too the conduct of the prisoner, his situation, whether or not there was any apparent means of escape, all may and should be considered; for, if the life of the deceased was taken in the necessary defense of the prisoner's life, or under such circumstances as justified him in believing it necessary, the presumption of malice is overborne, and he is entitled to an acquittal. *State v. Collins*, 32 Iowa, 36; *State v. Medlin*, 1 Wins. (N. C.) 56; *Bohannon v. Com.*, 8 Bush (Ky.), 481; *Bound v. State*, 43 Ga. 88; *State v. O'Connor*, 31 Mo. 389; *State v. Conolly*, 3 Oregon, 69; *Head v. State*, 44 Miss. 731; *State v. Thompson*, 9 Iowa, 9; *Com. v. Crawford*, 8 Phil. (Penn.) 490; *State v. Patterson*, 45 Vt. 308; *State v. Porter*, 34 Iowa, 131; *Hurd v. People*, 25 Mich. 405.

The mere fact that the defendant *believed* it necessary to take the life of his enemy is not enough; the facts must be such as to satisfy the jury that a *reasonable man* under the same circumstances would have had such apprehensions of imminent danger to his life. *State v. Shipper*, 10 Minn. 223. And as tending to establish this defense, he may show that the deceased made threats against him *at or about* the time of the murder, showing a hostile feeling

Presumption of higher degree of guilt.

§ 435. In some cases the law goes farther, and attaches to acts criminal in themselves a degree of guilt higher than that to which they are naturally entitled. It was

toward him, and also acts showing an intention on the part of the deceased to carry those threats into execution. *Elizabeth v. State*, 27 Texas, 329; *Myers v. State*, 33 id. 525; *State v. Sloan*, 47 Mo. 604; *Carico v. Com.*, 7 Bush (Ky.), 124. And it is held that such threats may be proved, even though the respondent was not aware of them at the time of the killing, if it is doubtful which began the affray. *People v. Scoggins*, 37 Cal. 676. But not otherwise. *Gonzales v. State*, 31 Texas, 495. Or, as tending to show want of actual malice, it has been held that it may be proved that both parties were intoxicated, and had been drinking together just prior to the killing; not, however, as a justification or excuse for the crime, but to reduce it to manslaughter. *Kriel v. Com.*, 5 Bush (Ky.), 362; *People v. Williams*, 43 Cal. 344. But if the killing is unequivocal and unprovoked, the fact that it was committed while intoxicated will not be allowed to affect the legal character of the crime. *Friery v. People*, 2 Keyes (N. Y.), 424; *Real v. People*, 42 N. Y. 270. Or the act may be shown to have been committed in sudden frenzy induced by anger, to reduce the grade of the crime. Or the respondent may show that he was insane at the time when the act was committed. *People v. Cole*, 7 Abb. Pr. (N. Y. N. S.) 321; *Dow v. State*, 3 Heiskell (Tenn.), 348. Indeed, any thing may be shown that has a tendency to show want of 'malice, lack of moral accountability, or that goes in justification, mitigation or excuse of the crime, and to overthrow the presumption of malice, which the law implies from the killing. This need not be done by evidence which excludes *all reasonable doubt*, nor even by a *preponderance* of evidence; it is enough if he shows grounds for a *reasonable doubt that his act is willful*. *State v. Porter*, 34 Iowa, 181.

It is not for the prisoner to prove his innocence, but for the State to prove his guilt. The law, with a reasonable regard for men's lives, presumes every man to be innocent until he is proved to be guilty, and this presumption is not a mere show, a mere fiction, but stands between a prisoner and the State like a wall of adamant, and is a complete protection, unless the State demolishes and overthrows it, by evidence of his guilt, that leaves no reasonable doubt in the minds of the jury. Indeed, the proof of guilt must be full and complete, not only beyond a reasonable doubt, but it must be inconsistent with any reasonable theory of his innocence. By a reasonable doubt is not meant a *captious*, *forced*, or *artificial* doubt, but a *real* doubt, which, after a fair examination of the whole proof, presents itself to the mind, and leads the jury to hesitate, does not satisfy them, causes their mind to oscillate between acquittal or conviction, in a word, if there is such a doubt in their minds as would lead them to hesitate about acting against it in the ordinary business affairs of life, they

[* 548] on this principle that the entering into * measures for deposing or imprisoning the king, was held to be an overt act of compassing his death.¹ So, if a man, without justification, assaults another with the sole intention of giving him a slight beating, and death ensues, he is held to be guilty of homicide.² And if several persons go out with the intention of committing a felony, and in the prosecution of the general design one of them commits any other felony, all are accountable for it.³ (a)

Maxim “ *Qui semel malus, semper præsumitur esse malus eodem genere.*”

§ 436. The presumptions in the two preceding articles are particular cases of the maxim “ *Qui semel malus, semper præsumitur esse malus eodem genere,*”⁴ another instance of which has been already given.⁵ But the foregoing applications of it, especially the second, have been attacked by some modern writers as repugnant to

¹ Fost. Cr. Law, 195-6.

⁴ Cro. Car. 317.

² 4 Blackst. C. 200.

⁵ *Suprà*, sect. 2, sub-sect. 8, § 413.

³ 1 Hale, P. C. 439.

should acquit the prisoner, for the prosecution has failed to overcome the presumption of innocence, which is the prisoner's bulwark, by that degree of evidence which entitles it to a conviction. It is not enough that the mystery of the crime cannot be solved from the evidence except upon the supposition of the defendant's guilt. The facts proved must be susceptible of explanation upon no reasonable hypothesis consistent with his innocence. *Schusler v. State*, 29 Ind. 394 ; *State v. Ostrander*, 18 Iowa, 435 ; *People v. Bennett*, 41 N. Y. 137 ; *State v. Vincent*, 24 Iowa, 570.

(a) If a number of persons conspire to do an unlawful act, and in the prosecution of that design a person is killed, the law holds all the persons present, and engaged in the conspiracy, guilty of murder. But in order to fix guilt upon all, the murder must have been done in the prosecution of the design, unless the original design amounted to a felony, in which case, even though the murder was collateral to the principal design, legal guilt is imposed upon all. *United States v. Ross*, 1 Gallis. (U. S.) 624.

natural justice and humanity,¹ as well as to the passages of the Roman law, "In maleficiis voluntas spectatur, non exitus,"² "Fraudis interpretatio semper in jure civili non ex eventu duntaxat, set et consilio quoque desideratur."³ But it may well be doubted whether these passages, standing as they do in the Digest without context, mean to express more than the unquestionable principle that there can be no crime where there is no criminal intention; or, as our own law has it, "Actus non facit reum nisi mens sit rea."⁴ And so far from being at variance with natural justice or humanity, the maxim in question seems a principle of general jurisprudence, and is founded in true morality and policy. The principle is recognized in the laws of *France⁵ and Louisiana,⁶ and, it is said, [* 549]

¹ Benth. Jud. Ev. bk. 5, ch. 4; Phillimore, Principles and Maxims of Jurisprudence, 43.

² Dig. lib. 48, tit. 8, l. 14.

³ Dig. lib. 50, tit. 17, l. 79.

⁴ Bk. 1, pt. 1, § 96.

⁵ The following exposition of the French law on this subject may not be deemed misplaced. "Souvent la loi pénale conclut *à priori*, de l'existence de certains faits qui rendent le délit vraisemblable, à l'existence même du délit. Mais la légitimité d'une présomption aussi grave est subordonnée à deux conditions: 1°, que le fait constaté emporte certitude morale du fait incriminé par la loi; 2°, que le fait constaté soit lui-même imputable. Ces deux conditions se trouvent réunies dans le cas prévu par l'article 61 du Code pénal, qui punit, comme complices des malfaiteurs exerçant des violences contre la paix publique, ceux qui, connaissant leur conduite criminelle, leur fournissent habituellement une retraite. Le fait de loger habituellement les malfaiteurs rend éminemment vraisemblable une coupable association. Ce fait est parfaitement imputable; la loi, en le frappant, ne fait qu'aggraver la pénalité d'un acte déjà répréhensible en lui-même. C'est là de la rigueur peut être; mais ce n'est pas de l'iniquité. On peut justifier de même la disposition de la loi du 21 Brumaire, an v. (tit. III. art. 2), qui répute coupable de trahison tout militaire qui, en présence de l'ennemi, aura poussé des clameurs tendant à jeter l'épouvante et le désordre dans les rangs. La vraisemblance d'une intelligence criminelle avec l'ennemi, justifie l'application de la peine capitale à un fait qui, par lui-même, est déjà d'une extrême gravité." Bonnier, Traité des Preuves, § 674.

⁶ Crim. Code of Louisiana, § 41.

of China also;¹ and, in some cases at least, by the Roman law;² while the maxim in terms is found in the canon law,³ and is thus ably explained by one of the commentators upon it. “‘Semel malus, semper præsumitur malus.’ Regula videtur contraria charitati, quæ non cogitet malum, sed non est; non enim charitatis est malum non cogitare in omni casu, sed tantum, cum nulum subest fundamentum, quale subest in casu regulæ; præterea non præsumitur hic malus in omni mali genere, sed in eo tantum, in quo malus inventus est, idque solum, ut impediatur ne simile malum perpetret; unde hæc præsumptio non obest, sed potius prodest ei in quem cadit; uno verbo præsumptio de quâ regula, non est maligna, sed cauta utpote non nata ex pravâ malè judicandi consuetudine, aliòve vitio, sed ex justo *metu.”⁴

[* 550] No considerations of policy can justify the condemnation of a man who is either innocent, or of whose guilt any reasonable doubt exists; but it is very different where there is a proved basis of guilty intention to work on. There a man is rightly held accountable for the natural consequences of his misconduct, though he may not have intended them; and perilous indeed would it be to the community were this otherwise. The enormity of an offense is made up not only of the actual amount of mischief done by the criminal, but of the tendency of his conduct to encourage others to break the law; and in measuring this latter, regard must be had to the notorious difficulty of proving psychological facts. Look at the cases already put.⁵ A man, without justi-

¹ Benth. Jud. Ev. bk. 5, ch. 4.

² See Dig. lib. 47, tit. 10, l. 18, § 3.

³ Sext. Decretal. lib. 5, tit. 12, de Reg. Jur. Reg. 8.

⁴ Gibert. Corp. Jur. Can. Proleg. Pars Post. tit. 7, cap. 2, § 2, N. 20.

⁵ § 435.

fication, assaults another with the sole intention of giving him a slight beating; death ensues; ought a judicial tribunal to permit him to contend that he was not responsible for homicide? So, if several persons go out with the intention of committing a felony, surely the law is perfectly justified, in holding each responsible for all acts done by his companions in furtherance of the general design. For not only was the person who did the act encouraged in, if not instigated to, his guilt by the presence of the rest; but when several persons are involved in such a transaction, it is often extremely difficult to apportion to each his precise share of guilty intention; and, if the onus of doing this with accuracy were cast upon the law, the most wicked and cunning criminals would frequently escape their just punishment.

Statutory presumptions in criminal law.

§ 437. Many artificial presumptions have from time to time been introduced by statute into our criminal code. An instance is presented in the well-known * statute 21 Jac. 1, c. 27,¹ by which it was enacted that any woman delivered of a bastard [* 551] child, who should endeavor to conceal its birth, should be deemed to have murdered it, unless she proved it to have been born dead. This reproach to our legislation has been removed by 43 Geo. 3, c. 58, s. 3. So the 11 Geo. 4 & 1 Will. 4, c. 66, s. 12 (repealed by 24 & 25 Vict. c. 95, and re-enacted by 24 & 25 Vict. c. 98, s. 13), renders it felony for any person to purchase, receive or have in his custody or possession, without lawful excuse, any forged bank note, or other forged document of the nature therein specified, knowing the same to be forged,

¹ See Introd. pt. 2, § 46.

and enacts that the proof of lawful excuse shall lie on the party accused.

Presumptions for the protection of accused persons.

§ 438. Some presumptions of the criminal law are for the protection of accused persons. Thus, an infant under seven years of age is conclusively presumed incapable of committing felony;¹ (a) between the ages of seven and fourteen the presumption exists, but may be rebutted by evidence;² and a boy under fourteen is conclusively presumed incapable of committing a rape as principal in the first degree.³

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* SUB-SECTION II.

PRESUMPTIVE PROOF IN CRIMINAL CASES GENERALLY.

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¹ 4 Blackst. Com. 23; 1 Hale, P. C. 27-8.

² 4 Blackst. Com. 23; 1 Hale, P. C. 26-7.

³ Id. 212; and 1 Hale, P. C. 630.

(a) But in this country criminal liability is made to depend upon the question of moral responsibility, and the law does not raise a conclusive presumption from the age of a child. *State v. Goin*, 9 Humph. (Tenn.) 175.

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Rules regulating the admissibility of evidence the same in civil and criminal proceedings—Necessity for resorting to presumptive proof more frequent in the latter.

§ 439. The rules regulating the *admissibility* of evidence are, in general, the same in civil and criminal *proceedings;¹ and although presumptive evidence is receivable to prove almost any fact,² [* 553] the necessity for resorting to it is more frequent in the latter than in the former. The most heinous offenses are usually committed in secret,—visible proofs of works of darkness must not be expected;—and accordingly direct testimony against criminals is rarely attainable, except in those cases where one of several delinquents denounces his companions at the bar of justice. We do not mean that, for want of legitimate evidence, the law condemns and punishes on that which is inferior or less conclusive—quite the reverse. A chain of presumptive evidence often affords proof quite as convincing as the testimony

¹ See bk. 1, pt. 1, § 94.

² Chap. 1, § 295.

of eye-witnesses';¹ and as in criminal trials the interests at stake are greater, and the consequences of error infinitely more serious, a higher degree of assurance is required for condemnatory decision than in civil proceedings, where the mere preponderance of probability is sufficient ground for adjudication.² (a)

¹ Id. § 296.

² Bk. 1, pt. 1, § 95.

(a) Circumstantial evidence is not only admissible, even to secure a conviction in a criminal case, but it is often more satisfactory than positive evidence. *United States v. Gooding*, 12 Wheat. (U. S.) 460; *United States v. Cole*, 5 McLean (U. S.), 513; *United States v. Gilbert*, 2 Sumn. (U. S.) 19; *United States v. Martin*, 2 McLean (U. S.), 256; but the circumstances must be strong and numerous; *The Slavers*, 2 Wall. (U. S.) 383; so that, while each link in the chain may be weak, the aggregate of them may be so strong as to satisfy the mind and conscience of the jury. *McCann v. State*, 21 Miss. 471; *People v. Vadeto*, 1 Park. Cr. (N. Y.) 603; *Schusler v. State*, 29 Ind. 394. The legal test of the sufficiency of any evidence is its adequacy to satisfy the understanding and conscience of the tribunal to which it is addressed, and, in a criminal case, to exclude from the mind of the jury all reasonable doubts of the guilt of the accused, *Gilbert, J., in Murphy v. People*, 4 Hun (N. Y. S. C.), 106; it need not produce absolute certainty, but must be such as to produce a firm belief, in the mind of a discreet man, of the existence of the fact, so that he would act upon it in the most important concerns of life. *McGregor v. State*, 16 Ind. 9; *Sumner v. State*, 5 Blackf. (Ind.) 579; *Findley v. State*, id. 576. Indeed, the force of circumstantial evidence is such that it may overcome entirely the force of positive proof. *Nelson v. United States*, Pet. C. C. (U. S.) 235; *La Negreda*, 8 Wheat. (U. S.) 173. It has been laid down by some eminent writers that circumstantial evidence is entitled to more force than positive evidence. Thus, Paley in his *Principles of Moral Philosophy*, book 6, chap. 9, says: "Circumstances cannot lie — they are inflexible proofs; witnesses may be mistaken or corrupted, but things can be neither." This may be true in some cases, but the whole proposition is predicated upon a fallacy. It presupposes that the circumstances are infallible, whereas the contrary is the truth. A train of circumstances pointing to the guilt of a certain person, or his connection with a transaction, may have been fraudulently brought about, to screen some other person from suspicion, or may be purely accidental, surrounding a person with a fearful net of suspicion, while he is entirely free from all connection with the principal act. But as was said by Chief Baron MacDonald in *Rex v. Smith*, "where the proof arises from the irresistible force of a number of circumstances which we cannot conceive to be fraudulently brought about, to bear upon one point, it is less fallible than, under some cir-

Rules of proof in criminal cases — Applicable in all cases.

§ 440. While all attempts to reduce the credibility of evidence to fixed degrees must ever be deprecated as absurd and mischievous, the experience of past ages

cumstances, direct evidence may be." There is no question but that innocent persons have often been convicted of crimes by such evidence, but the same is also true in cases where the evidence has been direct and positive, and there can be no question that, if the exact number of wrong convictions resulting from the one species of evidence, or the other, could be ascertained, as many erroneous verdicts could be predicated of positive as of circumstantial evidence. Absolute certainty can never be obtained from any evidence. We are necessarily compelled to depend upon our convictions, guided by our judgment, trusting to men and things, and according them such faith as they seem to us to be entitled to. No fixed rules or definite tests for ascertaining the truth in any case can be given, and the verdict of a jury is by no means decisive of the actual guilt or innocence of a party where there is a conflict of evidence. It is simply a legal result, attained, not as an absolute certainty, but as the expression of the belief of the jury according to their consciences under their oath. Therefore it has been well said, that the only real test of the sufficiency of evidence is its adequacy to satisfy the understanding and conscience of the triers, whether it be positive or only circumstantial. If absolute certainty, absolute truth, was required, legal tribunals would be useless institutions, and trials, either civil or criminal, would be wholly unproductive of results. Therefore the law leaves all doubtful questions of fact to be determined according to the belief and consciences of the triers, with such safeguards against erroneous results as human wisdom and experience can devise. The highest degree of evidence — that which comes from actual perception by the senses — can seldom be submitted to a court or jury; therefore they are, in the very nature of things, compelled to gain such information in reference to transactions involving questions of fact, as can be obtained from those who have actual knowledge of the facts by actual preception, or from circumstances detailed by witnesses. This necessarily renders it incumbent upon them to say according to their best judgment, *not what the absolute truth of the matter is*, but what in their judgment it is, from the evidence before them. Their finding is their moral conviction of what the *real facts* are, from such legal evidence as is presented to them, and in the absence of legal errors the law makes such finding conclusive between the parties. Not necessarily because the finding is absolutely true, but because it is the result of the moral conviction of the triers from the evidence before them, which public policy and the welfare of society require should be the test of the rights of the parties in that transaction. *Smith v. Croom*, 7 Fla. 81; *Johnson v. Brock*, 23 Ark. 282; *Ingraham v. Plaskett*, 3 Blackf. (Ind.) 450.

would indeed be thrown away, if it did not point out the principal quicksands and dangers to be avoided, when dealing with the serious question of the guilt or innocence of persons charged with crime. Numerous rules have from time to time been suggested for the guidance of tribunals in this respect, among which the following are the soundest in principle, and most generally recognized in practice.

1. The onus of proving every thing essential to the establishment of the charge against the accused lies on the prosecutor.¹

[* 554] * 2. The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.²

3. In matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape than that one innocent person should suffer.³

When the proof is presumptive—There must be clear and unequivocal proof of the corpus delicti—Delicta facti transeuntis.

§ 441. The above hold universally; but there are two others peculiarly applicable when the proof is presumptive.

1. *There must be clear and unequivocal proof of the corpus delicti.*⁴ Every criminal charge involves two

¹ *Suprà*, sect. 2, sub-sect. 3, § 346.

² Bk. 1, pt. 1, § 95.

³ Introd. pt. 2, § 49, and bk. 1, pt. 1, § 95.

⁴ *R. v. Burdett*, 4 B. & A. 95, 123 and 162; Wills, Circ. Evid. 156, 3rd Ed.; *Evans v. Evans*, 1 Hagg. Consist. Rep. 35, 105; Burnett's Crim. Law of Scotland, 529; D'Aguesseau (*Œuvres*), tom. 4, pp. 422-3, 456. "Diligenter cavendum judici, ne supplicium præcipitet, antequam de crimine constiterit:" Matth. de Crim. ad Dig. lib. 48, tit. 16, c. 1, N. 2.

things: first, that an offense has been committed; and secondly, that the accused is the author, or one of the authors, of it. "I take the rule to be this," says Lord Stowell in his judgment in *Evans v. Evans*,¹—"If you have a criminal fact ascertained, you may then take presumptive proof to show who did it;—to fix the criminal, having then an actual *corpus delicti* * * *; but to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions." Sir Matthew Hale, also, in his *Pleas of the Crown*,² laid down the two following rules, which have met with deserved approbation. "I would never convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by * them, unless there were due proof made that a felony was committed of these goods. I would [* 555] never convict any persons of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead." And in *Starkie on Evidence*³ it is stated to be "an established rule, upon charges of homicide, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body." Such is the language of these eminent authorities. But the general principles

¹ 1 Hagg. Cons. Rep. 35, 105.

² 2 Hale, P. C. 290.

³ The coincidence between this and the following is observable: "De corpore interfecti necesse est, ut constet. * * * Si quis fassus se furem, confessio hæc non obest, nisi constet etiam in specie de rebus furto subtractis." Mathæus, de Prob. cap. 1, N. 4.

⁴ 1 Stark. Ev. 575, 3rd Ed. ; Id. 862, 4th Ed.

they lay down must be taken with considerable limitation; and, in order to treat the subject with accuracy, it is to be remarked that in some offenses the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving its author undetermined — the former being denominated by foreign jurists “*delicta facti transeuntis*,” and the latter “*delicta facti permanentis*.”¹ Under the former, *i. e.*, *delicta facti transeuntis*, are ranged those offenses the essence of which consists in intention; such as various forms of treason, conspiracy, criminal language, &c.; all which, being of an exclusively psychological nature, must necessarily be established by presumptive evidence,² unless the guilty party chooses to make a plenary confession.³ To these must be added the crime of adultery, respecting which Lord Stowell himself, in other places, lays down, as a fundamental rule, that it is [* 556] not * necessary to prove the fact by direct evidence;⁴ but that it is enough to prove such proximate circumstances as, by former decisions, or their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed.⁵ By the canon law of this country, however, this crime could not be proved by the unsupported confession (however plenary) of the party — a rule established to prevent per-

¹ Bonnier, *Traité des Preuves*, § 56; Case of Capt. Green and his Crew, 14 Ho. St. Tr. 1230.

² 3 Benth. Jud. Ev. 5; *R. v. Burdett*, 4 B. & A. 95, 122; Bonnier, *Traité des Preuves*, § 56; see *Introd.* pt. 1, § 12.

³ *Infra*, ch. 7.

⁴ *Loveden v. Loveden*, 2 Hagg. Cons. Rep. 1; *Williams v. Williams*, 1 Id. 299. See to the same effect, Ayl. Parerg. Jur. Canon. Angl. 45; Mascard. de Prob. Quæst. 10, N. 16; and Concl. 57-65; Sanchez de Matrimonio, lib. 10, Disput. 12, N. 40.

⁵ *Williams v. Williams*, 1 Hagg. Cons. Rep. 299, 300.

sons getting rid of the matrimonial tie through the means of pretended adultery.¹

Delicta facti permanentis — *Facts forming basis of corpus delicti.*

§ 442. In the other sort of cases — *delicta facti permanentis* ; or, as they have been sometimes termed, *delicta cum effectu permanente*,² the proof of the crime is separable from that of the criminal. Thus the finding a dead body, or a house in ashes, may indicate a crime, but does not necessarily afford any clue to the perpetrator. And here, again, a distinction must be drawn relative to the effect of presumptive evidence. The *corpus delicti*, in cases such as we are now considering, is made up of two things: first, certain facts, forming its basis; and, secondly, the existence of criminal agency as the cause of them.³ It is with respect to the former of these that the general principles of Lord Stowell and Sir Matthew Hale especially apply, the established rule being, that the facts which form the basis of the *corpus delicti* ought to be proved, either by direct testimony, or by presumptive evidence of * the most cogent and irresistible kind; or by a clear and unsuspected confession of the party.⁴ [* 557] This is particularly necessary in cases of murder, where the maxim laid down by Sir Matthew Hale seems to have been generally followed: namely, that the fact of death should be shown, either by witnesses who were

¹ See the judgment of Lord Stowell in *Mortimer v. Mortimer*, 2 Hagg. Cons. Rep. 310, 316; and *infra*, ch. 7, sect. 3, sub-sect. 3.

² 14 Ho. St. Tr. 1230.

³ "Constare (crimen) non dicitur, simul atque de facto constiterit; etiam de dolo et causâ facti liquere debet:" Matth. de Crimin. ad Dig. lib. 48, tit. 16, c. 1, N. 2. See also Bonnier, *Traité des Preuves*, § 56.

⁴ See *infra*, ch. 7.

present when the murderous act was done, or by proof of the dead body, or some portion of the dead body, having been seen; or, if the body is in a state of decomposition, or reduced to a skeleton, or for any other reason the portion of it seen is in such a state as to render identification by inspection impossible, it should be identified by dress or circumstances.²—“*Liquere debet hominem esse interemptum.*”

Principles on which this rule is founded.

§ 443. This rule rests on principles which have their foundation in the deepest equity and soundest policy. In the first place, when the crime is separable from the person of the criminal many sources of error are introduced *which do not exist in the opposite case.

[* 558] 1. A given event, the origin of which is uncertain, may be the result of almost innumerable causes, having their source either in accident or the agency of other persons. 2. The danger of rashly inferring the

¹ The practice of simulating death to attain particular objects is common in the East. See Family Library: Sketches of Imposture, Deception and Credulity, ch. 9, p. 139. “When some officers in India were breakfasting in the commander’s tent, the body of a native, said to have been murdered by the sepoys, was brought in and laid down. The crime could not be brought home to any one of them, yet there was the body. A suspicion, however, crossed the adjutant’s mind, and, having the kettle in his hand, a thought struck him that he would pour a little boiling water on the body. He did so; on which the murdered remains started up and scampered off.” No authority is cited.

² In *R. v. Clewes*, 4 C. & P. 221, the skeleton of a man was, after a lapse of twenty-three years, identified by his widow, from some peculiarity about the teeth. A carpenter’s rule and a pair of shoes found with his remains were also identified. When a skeleton is found, it frequently becomes of the utmost importance to determine whether it is that of a male or female, of a young or old person. For full information on this subject the reader is referred to Beck’s Med. Juris. p. 539 *et seq.*, 7th Ed., where several cases illustrative of the necessity of attending to it are given.

³ D’Aguesseau (*Œuvres*), tom. 4, p. 456.

guilt of a suspected person from inconclusive circumstances, may be aggravated by his own imprudence, or even by his criminal agency in other matters. 3. In witnesses and tribunals, the love of the marvelous and the desire to detect great crimes committed in secret. 4. The facility afforded by the preceding causes to false accusations against persons who are disliked. In the second place, the conviction of a man for an imaginary offense is a scandal to the administration of justice, and an injury to society, infinitely greater than an erroneous conviction for an offense really committed.¹

Sound policy of.

§ 444. The sound policy of this rule is fearfully established by some old cases. A very celebrated one, related by Sir Edward Coke, has been already given under the head of presumptions made in disfavor of the spoliator.² Sir Matthew Hale also mentions an instance, where a man was missing for a considerable time, and there was strong ground for presuming that another had murdered him and consumed the body to ashes in an oven. The supposed murderer was convicted and executed; after which the other man returned from sea, where he had been sent against his will by the accused, who, though innocent of murder, was not entirely blameless.³ There is also the case of a man named John Miles, who was executed for the murder of his friend, William Ridley, with whom he had been last seen drinking, and whose body was not found until after the execution of Miles. The deceased

¹ See Introd. pt. 2, § 49, and note (q) there.

² *Supra*, sect. 2, sub-sect. 8, § 415.

³ 2 Hale, P. C. 290.

[* 559] *had, while in a state of intoxication, fallen into a deep privy, where no one thought of looking for him.' This rule is said to have been carried so far, that where the mother and reputed father of a bastard child were observed to strip and throw it into the dock of a seaport town, subsequently to which the body of the infant was never seen, Gould, J., who tried the father and mother for the murder, advised an acquittal, on the ground that as the tide of the sea flowed and reflowed into and out of the dock, it might possibly have carried out the *living* infant.²

Proof of murder by eye-witnesses.

§ 445. Where, however, the fact of the murder is proved by eye-witnesses, the inspection of the dead body may be dispensed with; as is well illustrated by the case of *R. v. Hindmarsh*.¹ There, the prisoner, a seaman, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by blows from a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that, while the ship was lying off the coast of Africa, with other vessels near, the prisoner was seen one night to take the captain up and throw him into the sea, after which he was never heard of; while, near the place on the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this, it was objected by the prisoner's counsel that the corpus

¹ Theory of Presumptive proof, Append. case 5. See also the case of Antoine Pin, 5 Causes Célèbres, 449, Ed. Richer, Amst. 1773.

² Per Garrow, arguing, in *R. v. Hindmarsh*, 2 Leach, C. L. 569, 571.

2 Leach, C. L. 569.

delicti was not proved, as the captain might have been taken up by some of the neighboring vessels; citing Sir Matthew Hale and the case before Gould, J. The court, consisting of the judge of the Admiralty, *Ashhurst, J., Hotham, B., and several doctors of [* 560] the civil law, admitted the general rule of law; but Ashhurst, J., who tried the case, left it to the jury, upon the evidence, to say whether the deceased was not killed before his body was cast into the sea; and the jury having found in the affirmative, the prisoner was convicted, which conviction was afterward held good by all the judges.

Whether, in extreme cases, basis of corpus delicti provable by presumptive evidence.

§ 446. Whether it is competent, even in extreme cases, to prove the basis of the corpus delicti by presumptive evidence has been questioned. But it seems a startling thing to proclaim to every murderer that, in order to secure impunity to himself, he has nothing to do but consume or decompose the body by fire, by lime, or by any other of the well-known chemical menstrua, or to sink it in an unfathomable part of the sea.¹(a) Un-

¹ 3 Benth. Jud. Ev. 234; Bonnier, Traité des Preuves, § 56. We believe that Rolfe, B., once directed a grand jury that the rule excluding presumptive evidence of the basis of the corpus delicti is not universal. On this subject Chancellor D'Aguesseau expresses himself as follows:—"A Dieu ne plaise que le public puis jamais nous reprocher que nous donnons aux criminels une espérance d'impunité, en reconnaissant qu'il est impossible de les condamner, lorsque leur cruelle industrie aura été assez heureuse pour dérober aux yeux de la Justice, les misérables restes de celui qu'ils ont immolé à leur vengeance." D'Aguesseau, 1er Plaidoyer dans la cause du Sieur de la Pivardière, &c.

(a) While it is true that a conviction cannot and ought not to be had for murder without proof of the *corpus delicti*, yet it is not in all cases indispensable that the body should actually be found, as in instances of murders commit-

successful attempts of this kind are known to have been made,¹ and successful ones may have remained undiscovered.

¹ In *R. v. Cook*, Leicester Sum. Ass. 1834, Wills' Circ. Ev. 165, 3rd Ed., the prisoner was tried for the murder of a creditor who had called to obtain payment of a debt, and whose body he had cut into pieces and attempted to dispose of by burying. The effluvia and other circumstances, however, alarmed the neighbors, and a portion of the body remaining unconsumed, the prisoner was convicted and executed. A similar attempt was made by the accused in *The Commonwealth v. Webster*, Burr. Circ. Evid. 682.

ted upon the high seas that would be impossible; and, therefore, the law makes an exception, and allows the *corpus delicti* to be proved by other methods. This question was directly raised and passed upon in *United States v. Williams*, 1 Clifford's C. C. (U. S.) 5, which was a case of murder on the high seas, and the body was not found. The court held in that case that, although the respondent confesses to the murder, yet that this confession is insufficient to warrant a conviction, without some corroboration as to the *corpus delicti*; for a person thrown into the sea may escape, he may be picked up by a passing ship, or he may drift on to land; but *plenary* proof in such cases is not required, but the fact of death may be established by strong circumstantial evidence which renders it morally certain that death must ensue. The distance from land, the condition of the sea, the fact that other vessels are or are not in sight, or that there are no supports for the persons to cling to, are all elements to be considered, as well as the fact that a long time has elapsed, in which the person has not been heard from. But except under *extraordinary* circumstances when the party confesses the deed, or extrinsic evidence of the crime is found, convictions, however strong the probabilities of murder, cannot be had unless the body is found and identified. In cases of murder, the rule is, that two things as to the *corpus delicti* must concur—*death as the result, and a criminal agency as the means*. These must both be established, and the prisoner must be shown to have been connected with the criminal agency, to such an extent as to make him legally responsible therefor. Where direct evidence is given as to one, circumstantial evidence may be given as to the other. But in order to fix the guilt upon the prisoner by merely circumstantial or presumptive evidence, the facts proved must be such as are not only consistent with the guilt of the prisoner, but such as to be inconsistent with any *reasonable* hypothesis of his innocence." *People v. Bennett*, 49 N. Y. 137; *State v. Vincent*, 24 Iowa, 570; *Schusler v. State*, 29 Ind. 394; *State v. Ostrander*, 18 Iowa, 435. The identification of the body of the deceased need not be proved by witnesses who, by an actual *inspection* of the body, recognize it as the body of the person with whose murder the prisoner is charged; but it may be by the same class of proof as is used to identify the prisoner on trial, or any other material facts; but it should be of such a character as to leave no rea-

Presumptive evidence receivable to complete proof of corpus delicti—Death from violence—Accidental destruction or creation of indicia.

§ 447. The basis of a corpus delicti once established, *presumptive evidence is receivable to complete the proof of it; as, for instance, to fix the place [* 561]

sonable doubt of the identity. *Taylor v. State*, 35 Texas, 97. In *People v. Groves*, 5 Park. Cr. (N. Y.) 134, it was held that the identification of a hand or foot of the deceased was sufficient. Indeed, it may be said that any proof that satisfies the jury that the body is that of the deceased is sufficient; as fragments of the clothing identified as similar to that worn by the deceased when last seen alive, or any evidence which leaves no reasonable doubt about the fact. The methods resorted to to identify men or things are subject to no general rules. The author remembers an instance where a prisoner was on trial for pocket-picking, and it being shown that pocket-books of the description of the one in question were very numerous, and that there was apparently nothing to distinguish this from others of the same class, the owner was asked how he knew this pocket-book to be his; he swore that he "*knew it by its countenance*," and this was accepted by the court and jury as a sufficient identification, when, after numerous trials of his knowledge of its "countenance" by mixing it with many others of the same class, he with ease selected the one in question every time. In one case, *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303, evidence was received in identification of a dog, from one who swore that he recognized it by "its bark," and the evidence was held sufficient. Thus it is, that by familiarity with a thing we come to know it from all others of its class, even where there are no apparent distinguishing marks. It has familiarized itself to our eyes or ears, until we come to know it, as the man did his pocket-book by "its countenance." We cannot explain *how* or *why* we know it, yet we do and can distinguish it from others, as we distinguish one man from another by his face. We may sometimes be mistaken; but the chances are only in the ratio of one to a hundred that we are; therefore courts, recognizing this faculty in men, receive this class of evidence either of the eye or ear with little question. So where the prisoner confesses his guilt and there are extrinsic circumstances satisfying the jury beyond a reasonable doubt that murder has been committed, they may convict, although the body has not been found or seen so that its existence and identity can be established by eye witnesses. *State v. Lamb*, 28 Mo. 218. In *Ruloff v. People*, 18 N. Y. 179, the court held that, in order to convict for murder, the *death* must be proved directly, in some way, either by the finding and identification of the corpse, or by proof of criminal violence sufficient to produce death and exerted in such a manner as to account for the disappearance of the body.

of the commission of the offense,¹ the *locus delicti*;² and even to show the presence of crime, by negating the hypotheses of the facts proved having been the result of natural causes, or irresponsible agency. For this purpose all the circumstances of the case, and every part of the conduct of the accused, may be taken into consideration.³ On finding a dead body, for instance, it should be considered whether death may not have been caused by lightning, cold, noxious exhalations, &c., or have been the result of suicide. On this latter subject the following excellent directions, given by Dr. Beck to the members of his own profession, may not inaptly be inserted here: “Besides noticing the surface of the body, and ascertaining whether ecchymosis or suggillation be present, we should pay great attention to the following circumstances: The situation in which the wounded body is found, the position of its members and the state of its dress, the expression of countenance, the marks of violence, if any be present on the body, the redness or suffusion of the face. The last is important, as it may indicate violence in order to stop the cries of the individual. The quantity of blood on the ground, or on

¹ *R. v. Burdett*, 4 B. & A. 95.

² Dicks. Ev. in Scotl. 43.

³ So laid down by Buller, J., in the celebrated case of Captain John Donnellan, who was convicted and executed for the murder by poison of his brother-in-law, Sir Theodosius Boughton (Warwick Sp. Ass. 1781, Report by Gurney); by Parke, B., in *R. v. Tawell*, who was convicted of murder by poison at the Aylesbury Spring Assizes of 1845 (Wills' Circ. Ev. 188, 3rd Ed.); by Abbott, J., in *R. v. Donnell*, Lancaster Sp. Ass. 1817 (Id. 187); by Wilde, C. J., in *R. v. Hatfield*, Surr. Sp. Ass. 1847, MS.; by Lord Campbell, in *R. v. Palmer*, Cent. Cr. Ct. May, 1856; and by Pollock, C. B., in *R. v. Smethurst*, Cent. Cr. Ct. August, 1859. See also *R. v. Eldridge*, R. & R. C. C. 440, and *R. v. White*, Id. 508.

⁴ Beck's Med. Jurisp. 583, 7th Ed., where several very instructive cases are collected.

the clothes, should be noticed, and, in particular, *the probable weapon used, the nature of the wound, and its depth and direction. In [* 562] a case of supposed suicide, by means of a knife or pistol, the course of the wound should be examined, whether it be upward or downward, and the length of the arm should be compared with the direction of the injury. Ascertain whether the right or left arm has been used; and as the former is most commonly employed, the direction should correspond with it, and be from right to left." It is of the utmost importance to examine minutely for the traces of another person at the scene of death; for it is by no means an uncommon practice with murderers so to dispose of the bodies of their victims as to lead to the supposition of suicide or death from natural causes;¹ while, on the other hand, persons about to commit suicide, but anxious to preserve their reputation after death, or their property from forfeiture, or both, not unfrequently endeavor by special preparations to avert suspicion of the mode by which they came by their end.² And instances have occurred where, after death from natural causes, injuries have been done to a corpse with a view of raising a suspicion of murder against an innocent person.³ The following case strongly illustrates the difficulties which sometimes attend investigations of this nature. A man, on detecting his wife in the act of adultery, fell into a state of distraction, and having dashed his head several times against a wall, struck himself violently and repeatedly on the forehead with a cleaver, until he fell dead from a great number of

¹ Stark. Ev. 857, 4th Ed.

² Id. 863, 4th Ed.

³ See one of these, bk. 2, pt. 2, § 206.

wounds. All this was done in the presence of several witnesses; but suppose it had been otherwise, and that the dead body had been found with these marks of violence upon it, murder would have been at least suspected.¹ And even where there is the clearest proof [* 563] * of the infliction of wounds, death may have been caused by previous disease, or violence from some other source. Cases illustrative of the former hypothesis are pretty numerous;² and the two following show the necessity of not overlooking the latter. At an inn in France, a quarrel arose among some drovers, during which one of them was wounded with a knife on the face, hand, and upper part of the thorax near the right clavicle. The injuries were examined and found to be superficial and slight. They were washed, and an hour afterward he departed for his home; but the next morning was found dead, bathed in blood. Dissection was made, and the left lung and pulmonary artery were found cut. The surgeons deposed that this injury was the cause of death, and that it must have been inflicted after the superficial wound on the thorax, which was not bloody, but surrounded by ecchymosis. Such proved to be the fact,—on his way home he had been robbed and murdered.³ In another case, a girl expired in convulsions while her father was in the act of chastising her for a theft; and she was believed, both by himself and the bystanders, to have died of the beating. But, although there were marks of a large number of pretty severe stripes on the body, they did not appear to the medical

¹ Beck's Med. Jurisp. 562, 7th Ed.

² Several will be found in Beck's Med. Jurisp. ch. 15, 7th Ed., and Taylor's Med. Jurisp. ch. 29, 7th Ed.

³ Beck's Med. Jurisp. 588, 7th Ed.

man who saw it to be quite sufficient to cause death; and he therefore made a post-mortem examination, from which and other circumstances it was discovered that the girl, on finding her crime detected, had taken poison through fear of her father's anger.¹ And, lastly, a source of mischief is found in the destruction or fabrication of *indicia*, through the conduct of persons brought in contact, by duty or otherwise, with the bodies of individuals who have met with a violent death. In such cases, as is * well observed by a recent writer on circumstantial evidence: "The first observers are [* 564] often persons who are so exclusively impressed by the event itself, as to overlook what, at the time, may naturally be deemed insignificant matters; to take no note of them, or at least, none that can be confidently recalled to mind afterward. The common attentions of humanity all partake of this summary character. The first impulse is to see what relief can be afforded in the case. The body of the sufferer is turned over, raised up, perhaps removed, the blood carefully washed from the wound, &c. In this way, important indications may, inadvertently, be wholly obliterated. But a similarly injurious effect upon the evidentiary facts may be produced by the officious action of one or more persons, attracted to the spot by mere curiosity. The implement of destruction is often first discovered by observers of this class; it is handled with more or less of interest—passed possibly from hand to hand among several—until, by this very process, it is more or less deprived of the appearances which give it its peculiar value as an instrument of evidence. In this way not only may genuine facts be destroyed and lost, but spurious facts

¹ Beck's Med. Jurisp. 766, 7th Ed.

may be actually, though unintentionally, fabricated and interpolated into the case, to the obvious deception or confusion of those who come to observe afterward, and who may be the witnesses actually called upon to testify."¹ A good illustration of this is afforded by a case which once occurred in France. A young man was found dead in his bed, with three wounds on the front of his neck. The physician who was first called to see him had, unknowingly, stamped in the blood with which the floor was covered, and had then walked into an adjoining room, passing and repassing several times, and thus left a number of bloody footprints on the floor.

[* 565] *The consequence was that suspicion was raised against a party, who narrowly escaped being sent to take his trial for murder.²

Death from poison — Physical evidences of — Moral evidences of — Chemical tests of.

§ 448. It is in cases of supposed poisoning that the nicest questions arise relative to the proof of a corpus delicti. The evidences of poisoning are either physical or moral. Under the former are included the symptoms during life; the appearance of the body after death, or on dissection; and the presence of poison ascertained by the application of chemical agents used for its detection. Among the moral evidences are peculiar facilities for committing the crime, the purchasing or preparing poisonous ingredients, attempts to stifle inquiry, spreading false rumors as to the cause of death, abortive endeavors to cast suspicion on others, &c.³ The existence of disease

¹ Burrill, Circ. Ev. 141-2.

² Tayl. Med. Jurisp. 274, 7th Ed.

³ "Venenum arguis: ubi emi? à quò? quanti? per quem dedi? quo conscio?" Quintilian, Inst. Orat. lib. 5, c. 7, vers. fin.

(and poison is not unfrequently administered to persons laboring under it) will often explain the symptoms during life, and, in some cases, the appearances after death, which latter may likewise be the result of putrefaction; so that, in order to obtain clear proof of a *corpus delicti*, tribunals willingly avail themselves of the scientific tests which chemistry lends to justice for the detection of crime.¹ The value of these tests has, however, been much overrated. An infallibility has been attributed to them which they most certainly do not possess; and a notion seems to have got abroad, that in cases of poisoning the *corpus delicti* must be established by those tests alone, to the exclusion of all consideration of the physical and moral circumstances of the case—a doctrine which is both contrary to law² and an outrage on common sense. The science of toxicology *is not by any means [* 566] in a perfect state, particularly as regards the vegetable poisons;³ although the tests for one of the worst of them (hydrocyanic or prussic acid), and for the mineral poison most commonly used for criminal purposes (arsenic), are among the most complete. It is always advisable to employ as many tests as the quantity of suspected matter will admit; for in the case of each individual test there may, by possibility, be other substances in nature which would produce the appearances supposed to be peculiar to the particular poison; and the danger always exists, more or less, of forming the substance, the existence of which is suspected, by means of the chemical agents used for its detection. But when

¹ The tests of a large number of poisons are given with great minuteness in Beck's Med. Jurisp. See, also, Taylor's Med. Jurisp.

² See *suprà*, § 447.

³ Beck's Med. Jurisp. 754, 7th Ed.

several tests, based on principles totally distinct, are applied to different portions of a suspected substance, and each gives the characteristic results of a known poison, the chances of error are indefinitely removed; and the proof of the existence of that poison in that substance, especially if there are corroborative moral circumstances, comes short only of positive demonstration.

§ 449. In dealing with cases of suspected poisoning, it must be remembered that even when poison is actually obtained from the dead body, it may not only have been taken by accident, or with the view of committing suicide, but that instances have occurred where, after death from natural causes, a poisonous substance has been introduced into the corpse,¹ or into matter vomited or discharged from the bowels,² with the view of raising a suspicion of murder. This may, however, be detected by a careful post-mortem examination,³ and attention to the moral circumstances of the case.

Presumptive evidence always admissible to disprove corpus delicti.

[* 567] * § 450. Whatever may be the admissibility or effect of presumptive evidence to *prove* the corpus delicti, it is always admissible, and it is often, especially when amounting to *evidentia rei*, most powerful to *disprove* it. Thus the probability of the statements of witnesses may be tested by comparing their story with the surrounding circumstances; and in prac-

¹ Beck's Med. Jurisp. 770, 7th Ed.

² Taylor's Med. Jurisp. 16, 4th Ed.

³ Some consequences of poisoning during life — such, for instance, as the traces of recent inflammation in the upper intestines, cannot, it is said, be imitated by poison injected after death. Beck's Med. Jurisp. 770, 7th Ed.

tice false testimony is often encountered and overthrown in this way. Sir Matthew Hale relates an extraordinary trial for rape, which took place before him in Sussex, where the party indicted was an ancient wealthy man, turned of sixty, and the charge was fully sworn against him by a young girl of fourteen, with the concurrent testimony of her mother and father and some other relations; and where the accused defended himself successfully by showing that he had for many years been afflicted with a rupture so hideous and great as to render sexual intercourse impossible.¹ In another case, the prosecutrix of an indictment against a man for administering arsenic to her to procure abortion, deposed that he had sent her a present of tarts, of which she partook, and that shortly afterward she was seized with symptoms of poisoning. Among other inconsistencies, she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains, while, after repeated vomitings, the alleged matter subsequently preserved contained nearly fifteen grains, though the matter first vomited contained only one grain. The prisoner was acquitted, and the prosecutrix afterward confessed that she had preferred the charge from jealousy.²

¹ 1 Hale, P. C. 635. See bk. 2, pt. 2, § 201.

² *R. v. Whalley*, York Sp. Ass. 1829, Wills' Circ. Ev. 122, 3rd Ed. See further on this subject the elaborate judgment of Lord Stowell in *Evans v. Evans*, 1 Hagg. Cons. Rep. 105.

The hypothesis of delinquency should be consistent with all the facts proved.

[* 568] *§ 451. II. *The hypothesis of delinquency should be consistent with ALL the facts proved.*¹

The chief danger to be avoided, when dealing with presumptive evidence, arises from a proneness natural to man to jump to conclusions from facts, without duly advertg to others inconsistent with the hypothesis which those facts seem to indicate.² "The human mind," says Lord Bacon,³ "has this property, that it readily supposes a greater order and conformity in things than it finds; and although many things in nature are singular and entirely dissimilar, yet the mind is still imagining parallel correspondences and relations between them which have no existence." This tendency of the mind is very perceptible in the physical sciences, of which perhaps the most apposite instance is its having been for so many ages assumed as indisputable, that the planetary motions must necessarily be circular, or at least compounded of circular motions, to the utter exclusion of all less regular figures.⁴ When Copernicus

¹ Stark. Ev. 561, 573, 3rd Ed.; Id. 842, 859, 4th Ed.

² *Suprà*, ch. 1, § 298.

³ "Intellectus humanus, ex proprietate suâ, facilè supponit majorem ordinem et æqualitatem in rebus, quàm invenit: et cùm multa sint in naturâ monodica et plena imparitatis, tamen affingit parallela, et correspondentia, et relativa quæ non sunt." Bacon's *Novum Organum*, Aphorism 45. See also Bacon's *Advancement of Learning*, bk. 2.

⁴ This ancient prejudice proved a great source of embarrassment to Kepler, by whom the elliptical movements were first discovered. In investigating the planetary orbits, he says, "Primus meus error fuit, viam planetæ perfectum esse circulum; tantum nocentior temporis fur, quanto erat ab autoritate omnium philosophorum instructor, et metaphysicæ in specie convenientior." Kepler, *De Motibus Stellæ Martis*, pars 3, cap. 40. So, it was a received notion among many in the earlier and middle ages, that the number *seven* enjoyed a species of predominance in creation — there being seven notes in music, seven

also promulgated his theory of the solar system, it was *objected that, if this hypothesis were true, the inferior planet Venus must, at times, appear [* 569] gibbous like the moon ; a fact which was afterward fully established, on the invention of the telescope.¹ And in dealing with questions of fact this natural propensity cannot be too closely watched. If, as was well observed by some one, a certain number of pieces of wood will build a house, with the exception of one cross beam, it is the natural tendency of the mind to reject that beam. It should never be forgotten, as observed by an able writer on the law of evidence, that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist ;² an inevitable consequence of which is, that if any of the circumstances established in evidence is absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true. Take the case, put in a former section,³ of a man indicted for stealing a piece of timber, and a large body of circumstantial evidence adduced to show that it was carried off by one person, and that person the prisoner. Now, suppose it were to transpire in the course of the trial that the article stolen was so heavy that twenty men could not move it, here would be a fact absolutely inconsistent with the hypothesis of guilt, and clearly indicating mistake or mendacity somewhere. And not only may the hypothesis of guilt be overturned by facts absolutely falsifying it, but due attention should be paid to all contrary hypotheses and infirmative circumstances.

primary colors, seven days in the week, &c. ; from all of which it was sagaciously inferred that there necessarily *could not* be more than seven planets.

¹ Herschel's Discourse on the Study of Natural Philosophy, pt. 3, ch. 3.

² 1 Stark. Ev. 560, 3rd Ed. ; Id. 842, 4th Ed.

³ *Suprà*, sect. 1, sub-sect. 3, § 332.

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* SUB-SECTION III.

INCU LPATORY PRESUMPTIVE EVIDENCE IN CRIMINAL PROCEEDINGS.

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Inculpatory presumptive evidence in criminal proceedings — Real evidence — Evidence from antecedent conduct or position — Evidence from subsequent conduct — Confessorial evidence.

§ 452. We now proceed to examine more in detail the principal forms of inculpatory presumptive evidence in criminal cases. They are reduced to these general heads: ¹

¹ The author deems it common justice to acknowledge the large use he has made throughout this sub-section, of the 5th Book of Bentham's Treatise on Judicial Evidence, where he treats of circumstantial evidence. In that part of his work, we have the full benefit of the strong sense and observant mind of the writer, comparatively free from the peculiar notions and erroneous views which pervade and disfigure so much of the rest.

First. Real Evidence, or evidence from things.

Secondly. Evidence derived from the *antecedent* conduct or position of the accused. Under this head come motives to commit the offense: means, and opportunities * of committing it: preparations for the commission of, and previous attempts to commit it: [* 571] declarations of intention, and threats to commit it.

Thirdly. Evidence derived from the *subsequent* conduct of the accused. To this class belong sudden change of life or circumstances: silence when accused: false, or evasive, statements made by him: suppression, or eloignement of evidence: forgery of exculpatory evidence: evasion of justice, by flight or otherwise, and tampering with officers of justice: fear; indicated either*by passive deportment or a desire for secrecy.

Fourthly. Confessorial evidence.

Each of these has of course its peculiar probative force and infirmative hypotheses. The subject of real evidence has been treated in a former part of this work;¹ the suppression and eloignement of evidence, and the forgery of exculpatory evidence, have been mentioned under the head of presumptions in disfavor of a spoliator;² while silence under accusation, and false or evasive statements, as likewise confessorial evidence, will be reserved for the title of self-regarding evidence,³ to which they most properly belong. The others will now be treated in their order.

Motives, means and opportunities.

§ 453. MOTIVES TO COMMIT THE OFFENSE, AND MEANS AND OPPORTUNITIES OF COMMITTING IT.—A mischievous

¹ Bk. 2, pt. 2.

² *Suprà*, sect. 2, sub-sect. 8.

³ *Infra*, ch. 7.

event being supposed to have been produced, and Titius being suspected of having been concerned in the production of it, "What could have been his *motive*?" says a question, the pertinency of which will never be matter of dispute.¹ The mere fact, however, of a party being so situated, that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it. Almost [* 572] every child has something to *gain by the death of his parents, but how rarely on the death of a parent is parricide even suspected?² Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof; as where a person, accused of having set fire to his house, has previously insured it to an amount exceeding its value; or where a man, accused of the murder of his wife, has previously formed an adulterous connection with another woman, &c. On the other hand, the absence of any *apparent* motive is always a fact in favor of the accused; although the existence of motives invisible to all except the person who is influenced by them must not be overlooked. The infirmative hypotheses affecting *motives* to commit an offense are applicable, also, to *means* and *opportunities* of committing it;³ (a) and some unhappy cases show the danger of placing undue reliance on them. A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the prisoner, and the doors and windows were closed and secure as usual. The prisoner was condemned and

¹ 3 Benth. Jud. Ev. 183.

² 3 Benth. Jud. Ev. 187-8.

³ *Id.* 189.

(a) *Simmons v. State*, 5 Blackf. (Ind.) 579.

executed, chiefly on the presumption that no one else could have had access to the house; but it afterward appeared, by the confession of one of the real murderers, that they had gained admittance into the house, which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house, to an upper window of that in which the deceased lived; and that, having committed the murder, they retreated the same way, leaving no traces behind them.¹ (a)

¹ Stark. Ev. 865, 4th Ed. For another instance, see Burrill, Circ. Evid. 371.

(a) Human action, that is, voluntary action on the part of a rational being, is the result of some motive; hence when a person is charged with a heinous crime, as murder, the first and important inquiry that presents itself is, whether there was any apparent motive for the deed, and what that motive was, and the presence or absence of a motive has an important bearing in determining the guilt or innocence of the accused. Motives for the commission of a crime may exist, however, which are not apparent, and which human scrutiny or investigation fails to discover; therefore, when the evidence of guilt is strong, and no exculpatory facts are shown, a conviction may be had when no definite motive for the commission of the deed can be discovered or shown; but in such cases the evidence of guilt must be much stronger than where a motive is established and generally when the prosecution fails to establish a motive of some kind, an acquittal is the result. In *Regina v. Palmer*, Short-hand Rep. 308. Mr. Justice Campbell, in commenting upon the question of motive, said: "With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime, or whether there was not; or whether there was an improbability of its having been committed so strong as not to be overpowered by positive evidence. But if there be *any* motive which can be assigned, I am bound to tell you that the *adequacy* of that motive is of very little importance. We know from the experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties." Mr. Wills, in his work on Circumstantial Evidence, says: "It is always a satisfactory circumstance of corroboration when, in connection with convincing facts of conduct, an apparent motive can be assigned; but as the operations of the mind are invisible and intangible, it is impossible to go further; and it must be remembered that there may be motives which no human being but the party himself can divine. Nor must undue importance be attached to external circumstances supposed to be indicative of guilty motive, for there are few men

Preparations, and previous attempts.

§ 454. II. PREPARATIONS FOR THE COMMISSION OF AN OFFENSE, AND PREVIOUS ATTEMPTS TO COMMIT IT.—Under the head of *preparations* for the commission

to whom some or other of the forms of crime may not apparently prove advantageous. Neither ought the existence of apparent inducements to supersede the necessity for the same amount of proof as would be deemed necessary in the absence of such a stimulus. Suspicion, too readily excited by the appearance of supposed inducement, is incompatible with that even and unprejudiced state of mind which is indispensable to the formation of correct and sober judgment. And while it is true that frequently imputation and strong circumstances lead directly to the door of truth, it is equally true that to entirely penetrate the mind of man is out of human power, and that circumstances which have apparently presented powerful motives, may have never acted as such."

The absence of an apparent motive to commit a crime furnishes a strong presumption of innocence, but it is by no means conclusive. Neither on the other hand does a strong apparent motive by any means afford any thing more than a presumption of guilty connection with the crime, nor, unless coupled with other evidence of a satisfactory character, is it ever sufficient to uphold a conviction. Human experience has demonstrated that such evidence is quite unreliable, and that crimes of an atrocious character have often been committed by those who have had no apparent motive to commit the deed; while those who had a strong apparent motive to commit it, or who were to derive some great advantage by its commission, had no participation in it.

Motives are to be determined by the actions of men. If A deliberately points his gun at B and shoots him dead, without any apparent motive, even though he is to derive no sort of advantage from B's death, and although so far as any thing can be ascertained they were on the most friendly terms, yet A being sane at the time, the law will imply malice, and the presence or absence of an apparent motive to commit the deed would be of no practical importance. So again, where A, with the intention to do bodily harm to B, levels his gun at him, and instead of taking the life of B. shoots down and kills his nearest and best friend, yet says Lord Bacon, Max. Reg. 15, "the law giveth him no advantage of the error if another particular occur of as high a nature." Therefore it will be seen that the question of motive, while affording a strong presumption of guilt or innocence in proportion as its presence or absence is shown in a particular case, yet in cases where the evidence is positive, and no legally exculpatory facts are shown, its presence or absence is of small moment; but where the evidence is purely circumstantial, such evidence is deemed of peculiar value, and has great weight, as well also as in cases where a justification is alleged and attempted to be established.

* of an offense may be ranked the purchasing, collecting, or fashioning instruments of mis- [* 573] chief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstructions to its execution, or averting suspicion from the criminal.¹ Besides preparations of this nature, which are immediately pointed to the accomplishment of the principal design, there are others of a secondary nature for preventing discovery or averting suspicion of the former.² In addition to these preparations of the second order, may be imagined preparations of the third and fourth orders, and so on.³

§ 455. Of all species of preparations, those which are resorted to for the purpose of averting suspicion from the criminal require the most particular notice. A remarkable instance is presented in the case of Richard Patch, who was convicted and executed for the murder of his patron and friend, Isaac Blight. The prisoner and deceased lived in the same house, and the latter was shot one evening, while sitting in his parlor, by a pistol from an unseen hand. A strong and well-connected chain of circumstantial evidence fixed Patch as the murderer; in the course of which it appeared that, a few evenings before that on which the murder was committed, and while the deceased was away from home, a loaded gun or pistol had been discharged into the room in which the family when at home usually passed their evenings. This shot the prisoner represented at the time as having been fired at him, but there was every reason to believe that

¹ 3 Benth. Jud. Ev. 63, 64.

² Id. 64.

³ Id. 65.

it must have been fired by himself, in order to induce the deceased and his servants to suppose that assassins were prowling about the building.¹ Murderers are frequently [* 574] found busy for some *time previous to their crime in spreading rumors that from ill-health, imprudence, or other cause, the existence of their victim is likely to be short;² others prophesy impending mischief to him in more defined terms, and those in the lower walks of life throw out dark and mysterious hints as to his approaching death.³ The object of all this is to prepare the minds of his friends and neighbors for the event, and by diminishing surprise, to prevent investigation into its cause. *Previous attempts* to commit an offense are closely allied to *preparations* for the commission of it, and only differ in being carried one step further and nearer to the criminal act, of which, however, like the former, they fall short.⁴

Infirmative hypotheses.

§ 456. The probative force, both of preparations and previous attempts, manifestly rests on the presumption that an intention to commit the individual offense was formed in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. But, however strong this presumption may be when the corpus delicti has been proved, it must be taken in connection with the following infirmative hypotheses. 1°. The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken.

¹ Trial of Richard Patch for the murder of Isaac Blight, London, 1806. For another instance, see *R. v. Courvoisier*, Willes, Ev. 241, 3rd Ed.

² 3 Benth. Jud. Ev. 65-66; Wills, Circ. Ev. 79, 3rd Ed.

³ Stark. Ev. 850, 4th Ed.

⁴ 3 Benth. Jud. Ev. 69.

His intention may either have been altogether innocent ; or, if criminal, directed toward a different object.¹

1. Thus, a person may be poisoned, and another, innocent of his death, may have purchased a quantity of the same poison a short time before for the purpose of destroying vermin. So, predictions of approaching mischief to an individual, who is afterward found murdered, may frequently be explained on the ground that *the accused was really speaking the conviction of his own mind, without any criminal intention — [* 575] prophecies of death are much more frequently the offspring of superstition than of premeditated assassination. 2. As an example of criminal intention with a different object — murder by fire-arms is not uncommon ; and a person innocent of a murder might, a short time previous to its commission, have purchased a gun for the purpose of poaching, or even have stolen one which is found in his possession. So, A. might purchase a sword or pistol for the purpose of fighting a duel with B., but, before the meeting took place, the weapon might be purloined or stolen by C., in order to assassinate D.

§ 457. But, even when preparations have been made with the intention of committing the identical offense charged, or previous attempts have been made to commit it, two things remain to be considered :² 1. The intention may have been changed or abandoned, before execution. Until a deed is done, there is always a *locus pœnitentiæ* ; and the possibility of a like criminal design having been harbored and carried into execution by other persons, must not be overlooked. 2. The intention

¹ Id. 72.

² 3 Benth. Jud. Ev. 74.

to commit the crime may have persisted throughout, but the criminal may have been anticipated by others. A remarkable instance of this is presented by the celebrated case of Jonathan Bradford. This man was an inn-keeper. In the middle of the night, a guest in his house was found murdered in bed, his host standing over the bed with a dark lantern in one hand and a knife in the other. The knife and the hand which held it were both bloody, and Bradford on being thus discovered exhibited symptoms of the greatest terror. He was convicted and executed for this murder; but it afterward appeared that [* 576] it had been committed by another *person immediately before he came into the room of the deceased. But Bradford had entered it with a similar design; the symptoms attributed to consciousness of guilt were partly attributable to surprise at finding his purpose anticipated; while the blood on his hand and knife was occasioned by his having, when turning back the bed-clothes to see if the deceased were really dead, dropped the knife on the bleeding body;'

Declarations of intention, and threats—Infirmative hypotheses.

§ 458. DECLARATIONS OF INTENTION TO COMMIT AN OFFENSE, AND THREATS TO COMMIT IT.—Next to preparations and attempts, follow declarations of intention, and threats to commit the offense which is found perpetrated. Most of the affirmative hypotheses applicable to the former are incident to those now under consideration, which, however, have some additional ones peculiar to themselves. 1st. The words supposed to be declaratory of

¹ Theory of Pres. Proof, Append, Case 7.

criminal intention may have been misunderstood, or misremembered: 2ndly. It does not necessarily follow because a man avows an intention, or threatens to commit a crime, that such intention really exists in his mind. The words may have been uttered through bravado, or with the view of annoying, intimidating, extorting money, or other collateral objects. 3rdly. Besides, another person really desirous of committing the offense may have profited by the occasion of the threat, to avert suspicion from himself.¹ 4thly.

*It must be remembered that the tendency of a threat or declaration of this nature is to frustrate its own accomplishment. By threatening a man you put him upon his guard, and force him to have recourse to such means of protection as the law, or any extrajudicial powers which he may have at command, may be capable of affording to him.² "Still, however," as has been judiciously observed, "by the testimony of experience, criminal threats are but too often, sooner or

¹ A curious instance of this is related by a very old French authority. A woman of extremely bad character, one day, in the open street, threatened a man who had done something to displease her, that she would "get his hams cut across for him before long." A short time afterward he was found dead, with his hams cut across, and several other wounds. This was of course sufficient to excite suspicion against the female, who, according to the practice of continental tribunals at that time, was put to torture, confessed the crime, and was executed. Shortly afterward, however, a man who had been taken into custody for some other offense, declared that she was innocent, and that the murder had been committed by another man of whom he was the accomplice. That person was immediately arrested, and confessed the whole truth as follows: that happening to be passing in the street when the threat was uttered, he took advantage of that circumstance to make away with the murdered man, well assured that the woman's bad character would immediately direct toward her the attention of the officers of justice. Papon, Arrests, Liv. 24, tit. 8, arrest 1; cited, not very accurately, in the Causes Célèbres, vol. 5, p. 437, Ed. Richer, Amsterdam, 1773.

² 3 Benth. Jud. Ev. 78.

later, realized. To the intention of producing the terror, and nothing but the terror, succeeds, under favor of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief; and (in pursuance of that intention) the mischievous act.”¹ “Threats,” observes a recent author,² “are often disregarded and despised; it is only the more timid dispositions that are influenced by them; and in most minds, there is an unwillingness, even if fear be felt, to manifest it by any outward acts or cautionary proceedings. To this contempt of the mere language of an enemy and the exposure of person which has followed, have many courageous persons notoriously owed their deaths. And it may be that the threatener, in these cases, has counted, in advance, upon this very circumstance.” (a)

¹ Id.

² Burrill, Circ. Ev. 342.

(a) Threats to commit an offense are competent to be given in evidence against one charged with a crime, and in connection with other evidence tending to establish the prisoner's guilt, may be weighed by the jury, and may turn the scale where otherwise there would be a reasonable doubt. But mere threats are not of themselves sufficient to warrant a conviction. The person accused must, in some manner, be otherwise connected with the crime. *Dixon v. State*, 13 Fla. 636; *Stephens v. People*, 19 N. Y. 549.

But mere threats are regarded as of so grave a character in many instances, as to render the person making them liable to indictment and punishment. *State v. Myerfield*, Phill. (N. C.) 108; *Queen v. Redman*, L. R., 1 C. C. 12; *State v. Young*, 26 Iowa, 122. Therefore, in cases where the accused has recently made threats to commit the offense with which he is charged, they point strongly to his guilt, and, when accompanied with other circumstances that tend to establish his guilt, are regarded as sufficient to overcome a reasonable doubt that might otherwise arise upon the evidence in the absence of the threats. Indeed it may occur, and often does, that declarations made by a person, or collateral circumstances, may be of the highest importance in arriving at his motives or purposes.

Eyre, C. J., in *Rex v. Crossfield*, 26 St. Tr. 215, in commenting upon this class of evidence, says: “Such declarations are the explanation and connection of those facts which serve to make them intelligible. What a prisoner has

Change of life or circumstances.

§ 459. CHANGE OF LIFE OR CIRCUMSTANCES. — Having examined the probative force of criminative facts * existing before, though perhaps not discovered until after the perpetration of the offense, we [* 578] proceed to consider those occurring subsequent to it. Among these the first that naturally presents itself to notice, is a change of life or circumstances not easily capable of explanation, except on the hypothesis of the possession of the fruits of crime ; as, for instance, where

said in reference to a particular fact, is admissible evidence, not as a confession, but as evidence of the particular fact ; and such declarations therefore are receivable in all cases whatever, in order to explain and establish the state of any matter of fact which is in dispute, or is the subject of inquiry before a jury." This being the case in reference to past transactions, with equal propriety what a person has said in reference to some future transaction, which actually occurs, is admissible to show the disposition from which the act might proceed, and to show that it is less improbable that the person using the language would commit the offense, and to explain any ambiguity as well as the motive and object of the action contemplated by the words.

But mere threats are not sufficient of themselves. The prisoner must be connected with the principal fact by other and more direct evidence ; but this may be used as one of the links in the chain of evidence to establish guilt, and it is by no means an unimportant one.

Foster, J., in his *Crown Law*, page 78, thus comments upon this species of evidence : " Words " says he, " are transient and fleeting as the wind ; they are frequently the effect of sudden transport, easily misunderstood, and often misreported."

Dickinson, in Vol. 1, page 157 of his *Law of Evidence in Scotland*, says of this class of proof : " Mere threats often proceed from temporary irritation without deep-rooted hostility. They indicate a rash and unguarded, rather than a determinedly malignant character, and the very utterance of them, as every one knows, tends to defeat their execution. The man who has resolved on a crime is more apt to keep his purpose to himself, or to confide it to an associate under a seal of secrecy. Even the most wary, however, let their wicked purposes peep out accidentally in the freedom of companionship, or the weakness of drunken confidence. When such unguarded hints, dark, and apparently unmeaning at the time, coincide with the subsequent tokens of guilt, *they are strong cords in the net of criminative evidence.*"

shortly after a larceny or robbery, or the suspicious death or disappearance of a person in good circumstances, a person previously poor is found in the possession of considerable wealth;¹ and the like. The civil law held that the suddenly becoming rich was not even *prima facie* evidence of dishonesty against a guardian;² and in our criminal courts it is not, when standing alone, any ground for putting a party on his defense.³

Evasion of justice.

§ 460. EVASION OF JUSTICE. — By “Evasion of justice” is meant the doing some act indicative of a desire to avoid or stifle judicial inquiry into an offense of which the party doing the act is accused or suspected. Such desire may be evidenced by his flying from the country or neighborhood; removing himself, his family, or his goods, to another place; keeping concealed, &c. To these must be added the kindred acts of bribing or tampering with officers of justice, to induce them to permit escape, suppress evidence, &c. All these afford a presumption of guilt, more or less cogent according to circumstances. (a)

¹ See Burdock's case, Appendix, No. 1, Case 2.

² Cod. lib. 5, tit. 51, l. 10.

³ 2 Ev. Poth. 345.

(a) Flight is regarded as a badge of guilt, and so, indeed, is any attempt to evade arrest or trial. Anciently, flight, in cases of treason and felony, was regarded as such strong presumptive evidence of guilt, that, whether the prisoner was convicted or acquitted, his goods were forfeited, and it was the practice of the clerk, after a verdict of acquittal, to inquire of the jury whether there was any evidence that the prisoner had fled. Coke's Litt. 375.

But attempts to evade justice, whether by flight, concealment, disguise, change of name, or other means, are not conclusive evidence of guilt, but may be, and often are, susceptible of explanation upon a theory perfectly consistent with innocence.

Change of place only presumptive evidence of.

§ 461. The fact that about the time of the commission of an offense a person accused or suspected of it left the country, changed his home, &c., is only presumptive evi-

Gurney, B., in *Reg. v. Belaney*, *Frazer's Rep.* 170, in commenting upon the weight to be given to evidence of this character, said: "Men are differently constituted, as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt; and every man is, therefore, entitled to a candid construction of his words and actions, particularly if placed in circumstances of great difficulty." A person may ascertain that he is suspected of a crime of which he is entirely innocent, but facts and circumstances may be so strong against him, that he has not the courage to meet the charge; or he may have such a dread of imprisonment, or the public mind may be so prejudiced against him, that he seeks to avoid trial by flight. Therefore, while such evidence is entitled to great weight upon the question of guilt or innocence, when unexplained, yet, in the face of a reasonable explanation, or of circumstances that tend to furnish an explanation upon a theory consistent with the innocence of the person of the *particular* charge, they become of little or no value.

In *Wills on Circumstantial Evidence*, 81, the author refers to a case, *Rex v. Coleman*, tried at the Kingston Spring Assizes in 1748, where the prisoner was charged with murder, but, upon being brought before a magistrate for examination, he was so thoroughly convinced of his innocence, that he suffered him to go at large on bail to appear at the assizes. The coroner's request having brought in a verdict of guilty against him, he endeavored to escape from the danger of a trial, in the excited state of public feeling, by flight; but, adds the author, "he was subsequently apprehended, convicted and executed on a charge of murder of which he was unquestionably innocent." In commenting upon the force of this class of evidence, and the degree of caution with which it should be weighed, the author observes: "It is not possible to lay down any express test by which these various indications may be infallibly referred to any more specific origin than fear; whether that fear proceeds from the consciousness of guilt, or from the apprehension of undeserved disgrace and punishment, and from deficiency of moral courage, is a question which can be determined only from concomitant circumstances. *Prejudice* is often epidemic, and there have been periods and occasions when public indignation has been so much and so unjustly aroused, as reasonably to deter the boldest mind from voluntary submission to a trial. The consciousness that appearances have been suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct apparently incompatible with innocence, and drawn down the unmerited infliction of the highest legal penalty."

Mr. Justice Abbott, in his charge to the jury in *Rex v. Donnull*, cited by

dence of an intention to escape being rendered amenable to justice for that offense — a man may change his abode for health, business, or pleasure. In order to estimate [* 579] * the weight due to this presumption, it is most important to inquire into the party's general mode of life. In the case of a mariner, carrier, itinerant vender or itinerant handicraft, the inference of guilt

Wills, page 80, in a case where the respondent was charged with murder, and was shown to have fled, said: "The fact that the prisoner fled does not necessarily establish his guilt; a person, however conscious of his innocence, might not have courage to stand a trial; but might, although innocent, think it necessary to consult his safety in flight. It may be a conscious anticipation of punishment for guilt, as the guilty will always anticipate the consequences; but, at the same time, it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight, rather than stand his trial on a charge so heinous and scandalous as this is."

The degree of weight to be given to such evidence must necessarily depend upon the circumstances of each case. If a crime is committed, and, before suspicion has attached to him, the respondent flies, or resorts to other devices to escape a trial; or if after inquiries have been made of him, or in reference to him, and before any settled suspicion of his guilt has been aroused; or even if after suspicions have been aroused, but at a time when there is no special prejudice excited against him, or no circumstances that strongly point to his guilt, he flies and conceals himself, or seeks to avoid arrest by the devices usually resorted to by the guilty, such evidence is much stronger and more indicative of positive guilt than when he flies after proceedings have been commenced against him, when circumstances are apparently against him, and a strong prejudice is excited against him in the community.

While flight is a badge of guilt which raises a presumption against the accused, so, on the other hand, is the fact that a person charged with a crime, who has had ample opportunity after he has become aware of the charge and its nature to escape, neglects to do so, but stays and meets the charge, a badge of innocence, and may always be given in evidence, in criminal cases, and should always, in cases where there is no positive evidence of guilt, be weighed by the jury.

Escape from jail in which a prisoner is actually confined to await his trial is not regarded as of much weight upon the question of his guilt of the crime with which he is charged. *People v. Murphy*, Hun (N. Y.). And to avoid the presumption of guilt arising from flight, the respondent may show any fact tending to explain it upon a theory consistent with his innocence as that he apprehended violence. *Plummer v. Com.* 1 Bush (Ky.), 76.

from change of place might amount to little or nothing.' Moreover, the object in absconding might be to avoid civil process, or inquiry into some other offense.²

Infirmative hypotheses.

§ 462. But even the clearest proof that the accused absented himself to avoid the actual charge against him, although a strong circumstance, is by no means conclusive evidence of guilt. Many men are naturally of weak nerve, and, under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive, facts will be adduced in evidence against him; he may feel his inability to procure legal advice to conduct his defense, or to bring witnesses from a distance to establish it; he may be fully assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him. Add to all this that, even under the best regulated judicial system, more or less vexation must necessarily be experienced by all persons who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive.³

¹ 3 Benth. Jud. Ev. 176.

² Id. 180.

³ For the purpose of computing the average duration of a penal suit in France, the thirty volumes, in closely printed 12mo., of the Causes Célèbres were examined. It was not in every instance that the duration of the suit could be ascertained; but, in those in which it could, the average duration turned out to be near *six* years. (3 Benth. Jud. Ev. 174.) In this country, in places where there is no winter assize, a party committed in the month of September for a serious felony, cannot be tried until the following February or March.

[* 580] These considerations *are entitled to weight at all times, and in all places; but, in addition to them, the nature and character of the tribunal before which, and of the administration of justice in the country where the trial is to take place, must never be lost sight of. To say nothing of those cases where the tribunal lies under just suspicion of positive corruption, partiality, or prejudice, the principles on which it avowedly acts may in themselves be sufficient to deter any man from voluntarily placing himself in its power. In the case, for instance, of those tribunals which act on the maxims, "*In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi;*"¹ "*Hæreseos suspectus, tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit;*"² or of others which, on slight evidence, would, in order to extract confession, torture a suspected man so as perhaps to disable him for life;³ or of others acting on the principle laid down by certain eminent moralists, that it is justifiable to deliver up to capital punishment individuals whose guilt is not indisputably proved, on the ground that those who fall by a mistaken sentence may be considered as falling for their country,⁴ is it matter of wonder that innocent persons should fly to avoid the impending danger? Would it not be more surprising to find any waiting to meet the course of justice?⁵

¹ Introd. pt. 2, § 49, p. 72, note 1.

² Devot. Inst. Canon. lib. 3, tit. 9, § 81, Ed. 1852.

³ See Introd. pt. 2, § 70, p. 108, note 2, also § 69, and any treatise on the practice of the civil law in criminal cases.

⁴ See Introd. pt. 2, § 49, p. 72, note 1.

⁵ What a picture of the state of criminal procedure in the country where he lived, is presented by the declaration of the French lawyer, that he would fly if accused of stealing the steeples of *Nôtre Dame*! 3 Benth. Jud. Ev. 175.

§ 463. But there are other considerations, independent of tribunals or their practice, which might powerfully influence a man to seek to avoid being tried for a * suspected crime. The case may have attracted much public attention, and a strong popular [* 581] feeling may prevail against the supposed criminal. And here the occasional misconduct of the public press must not be overlooked. When facts have come to light indicating the probable commission of some crime conspicuous for its peculiarity or atrocity, the press of this country has too often forgot the honorable position it ought to occupy, and the fearful responsibility consequent on the abuse of its power. Under color of a horror of the crime, but more probably with the view of pandering to excited curiosity and morbid feeling, a course has been taken, calculated to deprive of all chance of a fair trial the unfortunate individual who was suspected of it. For weeks or months previous, his conduct and character have been made the continual subject of condemnatory discussion in the public prints, and in all places within the sphere of their influence. Circumstantial descriptions of the way in which the crime was committed, and sometimes actual delineations of it, with the accused represented in the very act; elaborate histories of his past life, in which he has been spoken of as guilty of crimes innumerable; minute accounts of his conduct in the retirement of his cell, and while under examination; and expressions of wonder and rage that he has had the audacity to withhold a confession of his guilt, have been daily and hourly poured forth. In one case, while certain parties were awaiting their trial for murder, the whole scene of the murder, of which, of course, they were assumed to be the perpetrators, was *dramatized*, and rep-

resented to a metropolitan audience.¹ The necessary consequence was, that a firm belief of the guilt of the accused was *imperceptibly worked into the [* 582] minds of the better portion of society, while the rest was inflamed to the highest pitch of excitement and exasperation against him. In the midst of all this the trial took place, which, under such circumstances, could be little better than a mockery. The judge and jury could hardly be considered, even by themselves, as individuals chosen to decide impartially on the guilt or innocence of the accused; but must rather have been expected to be formal registrars of a verdict of condemnation, already iniquitously given against him by the community, before he was heard in his defense. It is gratifying to be able to add that the misconduct here spoken of has, of late years, been greatly on the decline.

Offenses committed under prospect of change of place.

§ 464. We must not, however, dismiss this subject without observing that cases sometimes occur, where an offense is committed under the prospect of impunity offered by a change of place resolved on from other motives.

Ancient laws on this subject.

§ 465. Few things distinguish an enlightened from a rude and barbarous system of judicature more than the way in which they deal with evidence. The former *weighs* evidence; the latter, conscious perhaps of its inability to do so with effect, or careless of the conse-

¹ On the 7th of January, 1824, John Thurtell and Joseph Hunt were tried and convicted on unquestionable evidence for the murder of William Weare, on the 17th of October, 1823. The murder was dramatized, and the piece played at the Surrey Theatre on the 17th of November preceding the trial.

quences of error, sometimes rejects it in masses, and at others converts pieces of evidence into rules of law, by investing with conclusive effect some whose probative force has been found to be in general considerable. Our ancestors, observing that guilty persons commonly fled from justice, adopted the hasty conclusion that it was only the guilty who did so, according to the maxim, "*Fatetur facinus qui fugit iudicium.*"¹ Under the old law, a man who fled to avoid being tried for treason *or felony, forfeited all his goods and chattels, even though he were acquitted;² and in such [* 583] cases the jury were charged to inquire, not only whether the accused were guilty of the offense, but also whether he had fled for it, and if so, what goods and chattels he had. This practice was not formally abolished until the 7 & 8 Geo. 4, c. 28, s. 5. Nor was the notion peculiar to the English law. We find traces of it among the earlier civilians, who lay down, "*Reus per fugam sui penè accusator existit.*"³ Among the later civilians,⁴ as well as among ourselves in modern times, more correct views have prevailed; and the evasion of justice seems now nearly, if not altogether, reduced to its true place in the administration of the criminal law, namely, that of a *circumstance* — a fact which it is always of importance to take into consideration; and which, combined with others, may supply the most satisfactory proof of guilt, although,

¹ 5 Co. 109 b; 11 Co. 60 b; Jenk. Cent. 1 Cas. 80.

² Co. Litt. 373 a and b; 5 Co. 109 b; 19 Ho. St. Tr. 1098. According to some authorities, indeed, this forfeiture was inflicted on the ground that the flight was a contempt of the law, and substantive crime in itself. Plowd. 262; 19 Ho. St. Tr. 1098.

³ Voet. ad Pand. lib. 22, tit. 3, N. 5; Novel. 58, cap. 4.

⁴ Mascard. de Prob. Concl. 499; Matth. de Prob. cap. 2, N. 69; Voet. in loc. cit.

like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility.

Fear indicated by passive deportment, &c. — Infirmative hypotheses — Confusion of mind.

§ 466. FEAR INDICATED BY PASSIVE DEPORTMENT, &c.—The emotion of *fear* indicated by passive deportment when a party is accused, or perceives that he is suspected of an offense, is sometimes relied on as a criminative circumstance. The following physical symptoms may be indicative of fear:—“Blushing, paleness, trembling, fainting, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, hesitation, stammering, faltering of the voice,” &c.;¹ and, as the *probative force of each of [* 584] these depends on the correctness of the inference that the symptom has been caused by fear of detection of the offense imputed, two classes of infirmative hypotheses naturally present themselves. 1st. The emotion of fear may not be present in the mind of the individual. Several of the above symptoms are indicative of disease, and characteristic of other emotions, such as surprise, grief, anger, &c. With respect to the first, for instance, “blushing,” the flush of fever and the glow of insulted innocence are quite as common as the crimson of guilt. 2ndly. The emotion of fear, even if actually present, although presumptive, is by no means conclusive evidence of guilt of the offense imputed. The alarm may be occasioned by the consciousness of another crime, committed either by the party himself, or by others connected with him by some tie of sympathy, on whom judicial in-

¹ 3 Benth. Jud. Ev. 153.

quiry may bring down suspicion or punishment;¹ or even by the recollection of a fact, in consequence of which, without any delinquency at all, vexation has been, or is likely to be, produced to him or them.² So, the apprehension of condemnation and punishment though innocent, or of vexation and annoyance from prosecution, is a circumstance the weight of which, like that of the evasion of justice, depends very considerably on the character of the tribunal before which, and the forms of criminal procedure in the country where, his trial is to take place.³ Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection.⁴ *E. g.*, an habitual thief is taken into custody for a theft; that he should show symptoms of fear is natural enough, and, confounding one of his exploits with another, he may (especially if the time of the supposed offense be very remote) *imagine himself to recollect a theft in [* 585] which, in truth, he bore no part.⁵

Closely allied to this subject is the inference of the existence of alarm, and through it of delinquency, derived from *Confusion of mind*; as expressed in the countenance, or by discourse, or conduct.⁶ This, however, like the former, is subject to the infirmative hypotheses: 1st. That the alarm may be caused by the apprehension of some other crime or some disagreeable circumstance coming to light;⁷ 2nd. Consciousness on

¹ 3 Benth. Jud. Ev. 157.

² Id.

³ *Suprà*, § 462.

⁴ 3 Benth. Jud. Ev. 157.

⁵ 3 Benth. Jud. Ev. 158.

⁶ Id. 149.

⁷ There is a well-known case of a man, who being wrongly suspected of harboring a person accused of a state crime, his house and even his bed-chamber, as he was lying in bed, were searched by the officers of justice. He had

the part of the accused or suspected person that, though innocent, appearances are against him.¹(a)

at the moment in bed with him a female whose reputation would have been ruined by the disclosure; and confusion, more or less, he must have betrayed. His presence of mind saved himself and her, by uncovering enough of her person to indicate the sex, without betraying the individual. See 3 Benth. Jud. Ev. 151 (note).

¹ 3 Benth. Jud. Ev. 151.

(a) The appearance of a person when charged with a crime, or when the crime is discussed in his presence, or when in the presence of his victim, is proper to be given in evidence; and the degree of weight to be given thereto is for the jury, in view of all the facts and circumstances surrounding the case. Such evidence generally is very inconclusive and entitled to little consideration. A hardened criminal would be likely to exhibit little fear or emotion under such circumstances, however great his guilt; while an innocent person might be completely overcome with terror at the base idea that he and suspected of a guilty connection with the crime. The court in its charge to the jury, upon the trial of Prof. Webster for the murder of Parkman, it seems to me, placed this species of evidence, and the weight to be given to it, in its true light. "Such are the various temperaments of men," said the court, "and so rare the occurrence of the sudden arrest of a person upon the charge of a crime so heinous, that who of us can say how a guilty man ought to or would be likely to act in such a case? Or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected? Or that a guilty man, who by knowledge of his danger might be somewhat braced up for the consequences, would always appear agitated or the reverse?" This class of evidence should always be weighed with great caution, for no person can tell how another would be likely to act under such circumstances. A person charged with a crime may give way to his fears and be overcome with emotion, when he is entirely innocent of the charge. Indeed, as a general thing, an innocent person would, as suggested by the court in the case just cited, be more apt to be overcome in this way than a guilty person who, conscious of his guilt and expecting arrest, has had an opportunity to prepare himself for the emergency. Indeed it is generally regarded as a badge of guilt that a prisoner, charged with a heinous crime, exhibits no emotion, rather than a badge of innocence. A person who is charged with a crime of a heinous nature, involving his life, who exhibits no emotion as the details of the crime are being given, and who seems to be indifferent to the result, can generally be set down as a person possessed of a hardened nature, and as one who would be much more likely to commit such a crime than one who exhibited a nervous fear, or who is susceptible to those emotions which generally move persons who are not familiar with crime. A prisoner cannot always control

Fear indicated by a desire for secrecy.

§ 467. FEAR INDICATED BY A DESIRE FOR SECRECY.—The presence of fear may be evidenced in another way, namely, by acts showing a desire for secrecy; such as doing in the dark what, but for the criminal design, would naturally have been done in the light; choosing a spot supposed to be out of the view of others for doing that which, but for the criminal design, would naturally have been done in a place open to observation; disguising the person; taking measures to remove witnesses from the scene of the intended unlawful action, &c.¹ (b)

¹ Id. 160, 161.

his appearance or his emotions when undergoing a trial for his life or liberty. Different natures will exhibit different appearances, and that which in one might result from conscious guilt, in the other results from conscious innocence. Therefore jurors should always be cautious in construing and weighing this species of evidence, and never, where the evidence is purely circumstantial, allow it to overcome that reasonable doubt that would exist except for such evidence. The appearance of a prisoner when charged with a crime, even though indicative of guilt, is not of itself sufficient to warrant a conviction. *Tyner v. State*, 5 Humph. (Tenn.) 383. Silence and unusual seriousness on the part of a person charged with a crime, at or about the time when the offense was committed, is proper to be shown in evidence, and may, if sustained by other evidence, be sufficient to establish a guilty knowledge, or a conviction even. *Johnson v. State*, 17 Ala. 618. So silence when a person is charged with a crime, in the presence of guilty appearances, is also regarded as a badge of guilt, but all such evidence depends for its value and weight upon the peculiar circumstances of each case. No rules for weighing such evidence can be given; it should always be received and weighed with caution, and may be strong, or it may be weak, depending in that respect entirely upon the circumstances of each case. *Com. v. Kenney*, 12 Metc. (Mass.) 235; and the same is true where a prisoner gives conflicting accounts of matters which he endeavors to explain. *State v. Gillis*, 4 Dev. (N. C.) 606. Where the evidence is sufficient to convict, although purely circumstantial, the fact that no motive to commit the crime is established is not material. *Sumner v. State*, 5 Blackf. (Ind.) 579.

(b) Attempts to bribe his keepers, or to escape from jail, may be given in evidence, but they do not afford absolute proof of guilt. *Dean v. Com.*, 4 Gratt. (Va.) 579.

Acts such as these are, however, frequently capable of explanation. 1st. It is perfectly possible that the design of the person seeking secrecy may be altogether innocent, at least so far as the criminal law is concerned.¹

[* 586] The lovers of servants, for instance, *are often mistaken for thieves, and vice versa.² 2ndly. The design, even if criminal, may be criminal with a different object, and of a degree less culpable than that attributed ;³ as, for instance, where a man, with a view of making sport by alarming his neighbors, dresses himself up to pass for a ghost.⁴

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General observations on the subject of this section—No form of judicial evidence is infallible.

§ 468. The subject of the present section may fairly be termed the Romance of Jurisprudence, and is indeed one of the few parts of that matter-of-fact science in which it becomes necessary, under penalty of the gravest consequences, to guard against illusions of the imagination. Unfortunately for the interests of society, the true principles on which presumptive evidence rests have not always been understood or adverted to by those intrusted with power ; and the judicial histories of every country supply melancholy instances, where the safety of individuals has

¹ Id. 162.

² 3 Benth. Jud. Ev. 162.

³ Id.

⁴ 3 Benth. Jud. Ev. 163.

been sacrificed to the ignorance, haste, or misdirected zeal of judges and jurymen dealing with this mode of proof. The consequence has been that a prejudice has arisen against it, so that a declamation on the dangers of convicting on presumptive evidence is ever sure of the ready ear of a popular assembly. Viewed either in a legislative or professional light, such an argument is scarcely deserving serious refutation. No form of judicial evidence is infallible; however strong in itself, the degree of assurance resulting from it amounts only to an indefinitely *high degree of probability;¹ and, perhaps, as many erroneous condemnations have [* 587] taken place on false or mistaken direct testimony as on presumptive proof.² Indeed, the most unhappy instances are those where the tribunal has been deceived by suspicious circumstances, casual or forged, coupled with false direct testimony; for in such cases the two species of evidence (though each is fallacious in itself) prop up each other. And as in the most important transactions of life, in all the moral and most of the physical sciences, we are compelled to rely almost exclusively on probable or presumptive reasoning,³ it seems difficult to suggest why a higher degree of assurance should be required in judicial investigations, even were such assurance attainable.

¹ See *Intro.* pt. 1, §§ 7 and 27; bk. 1, pt. 1, § 95.

² For cases of mistaken identity, see *infra*, ch. 6. On the other hand, as every one must be aware, positive direct testimony frequently has its origin in willful falsehood. The most heinous offenses, murder not excepted, have occasionally been committed with the view of afterward accusing innocent persons of them, in order to obtain a reward held out for the conviction of offenders. At Dublin, in January, 1842, one John Delahunt was convicted and executed for an offense of this nature. See, also, *R. v. M' Daniel and others*, O. B. Sess. 1755, reported in *Foster's C. L.* 121.

³ Locke on the Human Understanding, bk. 4, ch. 14.

Fallacy of the maxim "facts cannot lie."

§ 469. But while we condemn this, perhaps not unnatural error, what must be said of one of an opposite kind, infinitely more mischievous because promulgated by authority which we are bound to respect — namely, the setting presumptive evidence above all other modes of proof, and investing it with infallibility. Juries have been told from the bench, even in capital cases, that "where a violent presumption *necessarily* arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, because *facts cannot lie*."¹ Numerous remarks might be made on this [* 588] *strange dogma; the first of which that presents itself is, that the moment we talk of any thing following as a *necessary* consequence from others, all idea of *presumptive* reasoning is at an end.² Secondly, that even assuming the truth of the assertion that facts or circumstances cannot lie, still so long as witnesses and documents, by which the existence of those facts must be established,³ can lie, or even honestly misrepresent, so long will it be impossible to arrive at infallible conclusions from circumstantial evidence. But, without dwelling on these considerations, look at the broad proposition "*facts cannot lie*." Can they not, indeed? When, in order to effect the ruin of a poor servant, his box is

¹ Per Legge, B., in the case of *Mary Blandy*, 18 Ho. St. Tr. 1187. See, also, per Buller, J., in *Donellan's case*, Warwick Sp. Ass. 1781, Report by Gurney; per Mounteney, B., in *Annesley v. Earl of Anglesea*, 17 Ho. St. Tr. 1430; Gilb. Evid. 157, 4th Ed.; Paley's Moral and Political Philosophy, bk. 6, ch. 9, and the works of Chancellor D'Aguesseau, Tom. 12, p. 647.

² See *suprà*, § 468.

³ Domat, Lois Civiles, pt. 1, liv. 3, tit. 6, Préamb.; Theory of Presumptive Proof, pp. 23 and 28.

opened with a false key, and a quantity of goods stolen from his master is deposited in it; or, where a man is found dead with a bloody weapon lying beside him, which is proved to belong to a person with whom he has had a quarrel a short time before, and foot-marks of that person are traced near the corpse, but the murder has, in reality, been committed by a third person, who, owing a spite to both, put on the shoes of one of them and borrowed his weapon to kill the other, do not the circumstances *lie* — wickedly, cruelly *lie*?¹ There is every reason to fear that a blind reliance on the dictum, “facts cannot lie,” has occasionally exercised a mischievous effect in the administration of justice.

Cautions to tribunals respecting presumptive evidence.

*§ 470. In dealing with judicial evidence of all kinds, ignorance dogmatizes, science theorizes, [* 589] sense judges. The right application of presumptive, as of other species of evidence, depends on the intelligence, the honesty, and the firmness of tribunals. To convict, at least in capital cases, on the strength of a single circumstance, is always dangerous; and it has been justly observed that, where the criminative acts of a presumptive nature are more numerous, most of the erroneous convictions which have taken place have arisen from relying too much on general appearances, when no inchoate act approaching the crime has been proved against the accused.²

¹ A bad case of this latter kind is given in the *Theory of Presumptive Proof*, Append. Case 10. See, also, the case of *Adrien Doué*, 5 *Causes Célèbres*, 444, Ed. Richer, Amsterd. 1773; and *suprà*, bk. 2, pt. 2, on Real Evidence. See, also, the story narrated by Cicero, de Inv. lib. 2, s. 4, cited Ram on Facts, 97, and the quotation from *Cymbeline* in Goodeve on Evidence, 43-4.

² *Theory of Presumptive Proof*, 58, 59.

Superstitious notions.

§ 471. But the stream, and even the source of justice, may be poisoned by causes irrespective of the imbecility of laws or the errors of tribunals. One of these, from the influence it has frequently exercised in capital cases, and especially when the proof against the accused has been presumptive, deserves particular attention. We allude to the prevalence of superstitious notions, which, although much diminished by the march of enlightenment and civilization, is far from extinct. The days are, it is true, gone by when supernatural agency was allowed to supply chasms in a chain of proof; when persons were condemned to death on the supposed testimony of apparitions,¹ or because the corpse bled *at their touch;² but the *spirit* of superstition is ever

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¹ At a trial in 1754, for murder, before the Court of Justiciary in Scotland, two witnesses were allowed to swear to their having seen a ghost or spirit which they said had told them where the body was to be found, and that the pannels (*i. e.*, the accused) were the murderers. Burnett's Crim. Law of Scotland, 529. See, also, the unfortunate case of John Miles, who, in some degree at least, owed his conviction for the murder of his friend William Ridley to the reports spread through the neighborhood that the house, the scene of the supposed murder (for none had been committed in reality, the deceased having accidentally fallen into a deep privy where no one thought of looking for him), was haunted, and that the ghost of the deceased had appeared to an old man and denounced Miles as his murderer. Theory of Presumptive Proof, Append. Case 5. In the American case of the Boorns, likewise, so late as 1819, it is mentioned that a person repeatedly dreamed of the murder, with great minuteness of circumstance both in regard to the death and the concealment of the remains; but the innocence of the prisoners was fully established by the appearance of the party supposed to have been murdered. 1 Greenl. Ev. § 214, note (2), 7th Ed.

² Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 15, when speaking of slight presumptions, says, "Huc etiam pertinet fama sive rumor, et fuga, item fluxus sanguinis è cadavere, ad alicujus præsentiam, respectu cædis. Id enim ut aliquando dederit occasionem homicidæ detegendi, ita sæpè aliis causis, licet occultis, evenisse legitur." See, also, Burnett, *ubi supra*. In this country, in the

the same. There is a notion still very prevalent among the lower orders of society (though not by any means confined to them), that no person would venture to die with a lie in his mouth; and, consequently, that when a criminal awaiting his execution, especially a criminal who evinces religious feeling, makes a solemn protestation of his innocence, no alternative remains but to believe him, and that the tribunal by which he was condemned was either corrupt or mistaken. It is difficult to imagine a fallacy more dangerous to the peace of society than this. Conceding that such protestations are always deserving of attention from the *executive, what is there to invest them with any conclusive effect, in opposition to a chain [* 591] of presumptive evidence, the force of which falls short only of mathematical demonstration? The criminal, it is argued, is standing on the confines of a future world. True, but perhaps he does not believe in its existence. Take, however, the strongest case. Suppose his faith undoubted, that he has attended most assiduously to every religious duty, and displayed, up to the very moment of execution, a becoming sense of contrition for past offenses in general; but that he solemnly declares his innocence of the crime for which he is about to suf-

case of Mary Norkott and others, who were tried at the bar of the King's Bench, in the 4 Car. I. (1628-9), on an appeal of the murder of Jane Norkott, wife of one of the accused, two respectable clergymen swore that, the body having been taken out of the grave and laid on the grass thirty days after death, and one of the parties required to touch it, "the brow of the dead, which before was of a livid and carrion color, began to have a dew, or gentle sweat, arise on it, which increased by degrees, till the sweat ran down in drops on the face; the brow turned to a lively and fresh color, and the deceased opened one of her eyes, and shut it again; and this opening the eye was done three several times; she likewise thrust out the ring or marriage finger three times, and pulled it in again; and the finger dropped blood from it on the grass." 14 Ho. St. Tr. 1324, reported by Serjeant Maynard.

fer,—must he necessarily be believed? Is there nothing else to be taken into consideration? He reflects on the obloquy which an avowal of his guilt will bring on his family and connections,—that its effect will be to expose them to the finger of scorn for generations to come, or perhaps to reduce them to poverty, or drive them to self-expatriation. With all this present to his mind we need not be astonished if a criminal, whose notions of morality were perhaps never very clear, should, particularly when regard for his own memory is taken into the account, delude himself into the belief that a false protestation of innocence, made to avert so much evil, is an offense of an extremely venial nature, if not an act deserving positive approbation. We must not forget the position in life and the character of the persons who commonly make these protestations, or expect them to see, with the eyes of philosophy, the extent of the mischief which will inevitably result from a conviction in the public mind that an innocent man has been sacrificed by a corrupt or mistaken sentence. The immediate benefit to themselves, their families, or neighbors forms the boundary line of their vision, while the great interests of society are lost in a distant horizon. The judicial histories of all countries furnish examples of the most *solemn denunciations of the unjustness of their judges, or the perjury of the witnesses against them, made by criminals, the blackness of whose deeds and the justice of whose condemnation no rational being could doubt; and when we recollect the numerous instances which have occurred of persons making groundless confessions of *guilt*,¹ we shall cease to be surprised at false asseverations of *innocence*.

¹ See *infra*, chap. 7.

* CHAPTER III.

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PRIMARY AND SECONDARY EVIDENCE.

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Primary and secondary evidence—General rule—Secondary evidence not receivable until the non-production of the primary is accounted for.

§ 472. The exaction of *original evidence* is unquestionably one of the most marked features of English law.¹ And

¹ See Introd. pt. 1, § 29, and bk. 1, pt. 1, §§ 87-89.

[* 594] in the present chapter we propose to *consider the application of this principle to the proof of instruments and documents, which are sufficiently identified by description, and proximate to the issues raised, to be at least *prima facie* receivable in evidence. Such are said to be the "*Primary* evidence" of their own contents; and the term "*Secondary* evidence" is used to designate any derivative proof of them; such as memorials, copies, abstracts, recollections of persons who have read them, &c. It is a general and well-known rule, that no secondary evidence of a document can be received until an excuse, such as the law deems sufficient, is given for the non-production of the primary. Whether a proper foundation has been laid for the admission of secondary evidence is to be determined by the judge, and if this depends on a disputed question of fact he must decide it.¹

*Whether this principle extends to evidence extrà causam —
Answers of the judges in Queen Caroline's case.*

§ 473. And here a question presents itself which is alike important and embarrassing — is this principle confined to evidence *in causâ*, or does it extend to evidence *extrà causam*? The following questions were put by the House of Lords, and the following answers given by the judges, during the proceedings against Queen Caroline, in 1820.² "First, Whether, in the courts below, a party, on cross-examination, would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect,

¹ *Suprà*, bk. 1, pt. 1, § 82; *Harvey v. Mitchell*, 2 Moo. & R. 366; *Elmes v. Ogle*, 15 Jur. 180.

² 2 B. & B. 286-291.

without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?" "Secondly, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such *letter and not the whole of it, whether he [* 595] wrote such part or such one or more lines; and, in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?" "Thirdly, Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read, as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read?" The first of these questions the judges answered in the negative; on the ground that "The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness. If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then

the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the court may be possessed of the whole. If the course, which is here proposed, should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different [* 596] from that *which might be produced by a statement of a part." The first part of the second question, namely, "Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part?" the judges thought should be answered by them in the affirmative in that form; but to the latter, "and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter," they answered in the negative, for the reasons already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other. To the first part of the third question Lord Chief Justice Abbott answered as follows:—"The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but, that the letter itself must be read to manifest whether such statements are or are not contained in that letter. In delivering this opinion to your lordships, the judges do not conceive that they are presuming to offer to your lordships any new rule of evi-

dence, now, for the first time, introduced by them; but, that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence." To the latter part of the question he returned for answer, "the judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn after he shall have opened his case; that that is the ordinary course; but that, if the counsel who is cross-examining, *suggests to the court that he wishes to have the letter read immediately, in [* 597] order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, *that* becomes an excepted case in the courts below, and, for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."

The foregoing questions and answers were followed by this:¹ "Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the ques-

¹ 2 B. & B. 292-294.

tion refers to representations in writing or in words?" Lord Chief Justice Abbott delivered the following answer of the judges: "The judges find a difficulty to give a distinct answer to the question thus proposed by your lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships, as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, 'whether a witness has made such and such representation,' has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at *nisi prius*, referring * rather to contracts and agree-
 [* 598] ments, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked whether there is an agreement for a certain price for a certain article,—an agreement for a certain definite time,—a warranty,—or other matter of that kind being a matter of contract; and, when a question of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side, not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side, was or was not in writing; and, if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced. My lords, therefore,

although we cannot answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, namely, the want of an established practice referring to such a question by counsel; yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing (the proper course being to put the writing into his hands, and ask him whether it be his writing), considering the question proposed to us by your lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions relating to contracts or agreements, we, each of us, think, that if such a question were propounded before us at *nisi prius*, and objected to, we should direct the counsel to separate the question into its parts. My lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the House, that, by dividing the question into parts, I mean that the counsel would be directed to ask *whether the representation had been made in writing or by words. If he should ask [* 599] whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it."

Examination of them.

§ 474. The rule that an advocate who has a document in his possession shall not represent its contents to a witness may possibly be defended on the ground that

whoever uses a document in a court of justice has no right to suppress any part of it, or prevent its speaking for itself; although the fitness of extending even this principle to evidence *extra causam* is not beyond dispute. But whether a witness may be asked, *with a view to test his memory or credit*, if he has ever made a representation, not specifying whether verbal or written; or has written a letter, not saying to whom, when, or under what circumstances; in which representation or letter he has made statements inconsistent with the evidence given by him in *causa*, is a much larger question. It has been suggested that the above answers of the judges have not resolved this point in the negative, and that they were all based on the assumption that the letter was in the possession of the cross-examining counsel.¹ In practice, however, a different construction is put upon them;² and [* 600] we should at once dismiss the subject, *had not that practice been condemned by text writers on the law of evidence,³ and the practice founded on them been recently modified by the legislature.⁴ And here it may be doubted how far the proceedings in *Queen Caroline's case* are binding on tribunals, the

¹ Ph. & Am. Ev. 932.

² *Macdonnell v. Evans*, 11 C. B. 930. In *Henman v. Lester*, 12 C. B., N. S. 776, 789, it was said by Willes, J., that the rules laid down in *Macdonnell v. Evans*, and *The Queen's case*, were confined to cases in which the document would have been evidence upon the issue, or to contradict the witness if he had answered in a particular way; or in which the precise terms and language of the document were necessary to be referred to, in order to answer the question. And it was held by Willes and Keating, JJ., Byles, J., *dissentiente*, that the defendant might be asked in cross-examination, whether, in a previous proceeding in a county court, there had not been a verdict against him; although it was objected that this ought to be proved by the record of the verdict itself.

³ Ph. & Am. Ev. 931 *et seq.*; Stark. Ev. 221-227, 4th Ed.; Tayl. Evid. § 1301, 4th Ed.

⁴ See *infra*.

answers of the judges to the House of Lords having no binding force *per se*; and although in that case the House adopted and acted on those answers, it was not sitting judicially, but with a view to legislation, which finally proved abortive.

§ 475. It can hardly escape notice that throughout the answers of the judges on the occasion in question, "written instrument" and "document" are assumed to be convertible terms—a fallacy which has led to more errors than one. A *letter* is not, at least in general, a written *instrument*; and therefore taking the maxim of the common law to be as stated by Abbott, C. J., a letter does not fall within its meaning. But is it true as a historical fact, that "it is a rule of evidence as old as any part of the common law of England that the contents of a written instrument" (*à fortiori* the contents of a written document not coming within the description of an instrument), "if it be in existence, are *to be proved* by that instrument" (or document) "itself, and not by *parol* evidence?" And if this be so, is "parol evidence" here to be understood as comprehending every form of verbal, derivative, and extrinsic evidence? And is it further true that the rule has at every period of our legal history been applied to evidence *extrà causam*? and did the judges in *Queen Caroline's case* mean to convey this idea, when they spoke of how the contents of a written instrument *were to be proved? It would be difficult [* 601] either to prove or disprove *directly*, what was the practice in former times in this respect relative to evidence *extrà causam*; so much of our actual law of evidence being of comparatively modern growth, and our ancient books affording very slender information as to

what questions might be put in cross-examination, as distinguished from examination in chief. But it is by no means clear that, even in this latter case, our ancestors extended the principle requiring primary proof beyond records, deeds, and perhaps written instruments in general. The reasons given by the old lawyers for rejecting derivative or extrinsic evidence have manifest reference to such,¹ while all other documents seem to have been considered as mere "parol." And this view seems supported by the traces of the ancient practice which have come down to us. In the State Trials we constantly find the contents of documents given by witnesses from recollection;² but then the circumstance that those are the reports of state prosecutions, during very excited times, detracts from their value as accurate representations of the ordinary practice of the period. It is, however, tolerably certain that, so late at least as the latter end of the sixteenth century, all other forms of derivative evidence, such as hearsay, &c., were received as evidence in causâ, their weakness being only matter of observation to the jury.³ Now it seems improbable that while hearsay evidence was receivable *in chief* within three centuries of our own times, a witness could not, from the earliest period of English law, be asked in *cross-examination* either the contents of the most ordinary document, or whether he ever made a representation of some particular fact, because by possibility it might turn out that he had not done so verbally.

[* 602] * § 476. In dealing with this subject, much reliance is commonly placed on an analogy drawn

¹ See bk. 2, pt. 3.

² Bk. 1, pt. 2, § 115.

³ Bk. 1, pt. 2, §§ 112, 114.

from the rule of pleading which, previous to the 15 & 16 Vict. c. 76, s. 55, required profert to be made of deeds and some other species of writings. This seems founded chiefly on *Dr. Leyfield's case*,¹ where it is stated that "the reason that deeds being so pleaded shall be showed to the court is, that to every deed two things are requisite and necessary; the one, that it be sufficient in law; and that is called the legal part, because the judgment of *that* belongs to the judges of the law; the other concerns matter of fact, sc. if it be sealed and delivered as a deed; and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others: approve itself upon its showing forth to the court in two manners: 1. As to the composition of the words to be sufficient in law, and the court shall judge that; 2. That it be not razed or interlined in material points or places, and upon that also in ancient time the judges did judge, upon their view, the deed to be void, as appears in 7 E. 3, 57, 25 E. 3, 41, 41 E. 3, 10, &c., but of late times the judges have left that to be tried by the jury, s. if the razing or interlining was before the delivery; 3. That it may appear to the court and to the party, if it was upon condition, limitation, or with power of revocation, &c., to the intent that if there be a condition, limitation, or power of revocation in the deed, if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of the condition, limitation, or power of revocation, and therewith Litt. c. Conditions, f. 90, 91, 40 Ass. 34 agree. And these are the reasons of the law, that deeds pleaded in court shall be showed forth to the court." It was accordingly held in that

¹ 10 Co. 92.

case, that the defendant was bound to make proof of the letters-patent on which he rested his justification [* 603] *of the trespass complained of; but whether what follows the passage just quoted is to be read as the language of the court or of the reporter, is not easy to say. "And therefore it appears that it is dangerous to suffer any who, by the law, in pleading ought to show the deed itself to the court, upon the general issue, to prove in evidence to a jury by witnesses, that there was such a deed which they have heard and read; or to prove it by a copy: for the viciousness, rasures, or interlineations, or other imperfections in these cases, will not appear to the court; or peradventure the deed may be upon condition, limitation, with power of revocation; and by this way truth and justice, and the true reason of the common law, would be subverted. But yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there if that should appear to the judges, they may, in favor of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction; and if the jury find it, although it be not showed forth in evidence, it shall be good enough, as appears in 28 Ass. p. 3, but in 12 Ass. p. 16 the judges would not suffer a deed to be given in evidence which was not showed forth to the jury. Vide 26 Ass. p. 2 the like."

¹ The two cases from the book of Assizes will be found, on examination, to fall very far short of the general proposition which they are cited to support. The 26 Ass. pl. 2 is a little obscure; but the 12 Ass. pl. 16 is as follows:—"Trove fuit per verdict d'assize, que les tenements fueront dones a B. et a R. per un chartre que voloit ceux parolx, Dedi, etc. Et les defendants fueront les files B. et R.; et le pl' le fitz B. d'une autre feme. Et pur ceo que garrant ne chiet pas en lour conis. que deveront faire le tail, et la chartre ne fuit pas monstre

* * * * * “Also¹ the deed ought not only, as hath been said, to approve itself, but it * ought to be proved by others, sc. by wit- [* 604] nesses, that it was sealed and delivered; for otherwise, although the fabric and composition of the deed be legal, yet without the other it is of no effect.”

§ 477. Although one object of profert may have been to enable the court to judge, by inspection, of the sufficiency of the deed relied on, yet Serjeant Stephen, no mean authority on such matters, questions whether the practice originated in this view, and thinks that the producing the deed was only a compliance with the general rule of pleading, which requires all affirmative pleadings to be supported by an offer of some mode of proof.² In ancient times, when a cause turned on a deed, the witnesses to the deed acted in some degree as a jury, and were brought in by a process analogous to a jury process;³ and the object of laying the deed before the court was to enable them to see whether it was sufficient in law if proved, and if so, to issue process to bring in the witnesses. In confirmation of this it is to be observed that, at least in general, no profert was required of a document not falling within the technical definition of a deed, however completely an action or defense might rest on it,—*e. g.*, an agreement not under seal;⁴ or however indis-

en evidence ne pled, agarde fuit que le fitz recover, &c., uncore les files pled que la terre fuit doñ en tail, etc. Quære, si la chart ust este monstre; si la tail ust este ð les files.”

¹ 10 Co. 93 u.

² Steph. Plead. 485; and Append. note 68, 5th Ed.

³ Co. Litt. 6 b; Bro. Abr. tit. Testmoignes.

⁴ Steph. Plead. 483, 5th Ed.

⁵ Id.

pensable its production at the trial, as a bill of exchange.¹ And even of a deed no profert was required, unless the party pleading claimed or justified under it, nor even then unless he relied on its direct and intrinsic operation.²

§ 478. But whatever value may be attributed to the [* 605] *analogy from the theory of profert, there are other analogies much more to the purpose the other way. All other forms of derivative and remote evidence; such as hearsay, *res inter alios gestæ*, opinion evidence, and the like, may, in most instances at least, be used to test the credit of witnesses; and even the judges in *Queen Caroline's case* concede that a witness may be asked whether he ever made a *verbal* representation inconsistent with the evidence he has already given. Now, as it is indisputable that if that verbal representation were made to a third party it would not be evidence in chief, why is it evidence on cross-examination? The answer is obvious — that if the witness were untruly to deny having given a certain account of the transaction to which he has deposed, it would show a defect either in his memory or in his honesty; but does not this apply *à fortiori* to a statement reduced to writing, seeing that a man is less likely to forget what he has taken the pains to write down? Then, it is said, a portion of the writing might be suppressed, so that the court and jury would not see the *whole* of it; but this argument would exclude the verbal representation; for this latter may have been made in a conversation part of which is suppressed, and the whole of which, taken together (the rest, be it

¹ See *Ramus v. Crowe*, 1 Exch. 167; *Clay v. Crowe*, 8 Exch. 295; *Jungbluth v. Way*, 1 H. & N. 71; *Aranguren v. Scholfield*, Id. 494; 17 & 18 Vict. c. 125, s. 87.

² Steph. Plead. 484, 5th Ed.

observed, can be extracted on re-examination, or given by the witness himself in the way of explanation), would give an entirely different color to the matter. By requiring the document containing the supposed contradiction to be put into the hands of the witness in the first instance, the great principle of cross-examination is sacrificed at once. When a man gives certain evidence, and the object is to show that he has on a former occasion given some different account, common sense tells us that the way of bringing about a contradiction is to ask him if he has *ever* done so; in order that he may have no intimation of the time, place, or circumstances alluded to, or consequently of what means are *available to contradict and discredit him. Yet, [* 606] according to the practice under the resolutions in *Queen Caroline's case*, if the witness had taken the precaution to reduce his previous statement to writing, the writing must be put into his hands, accompanied by the question whether he wrote it; thus giving him full warning of the danger he had to avoid, and full opportunity of shaping his answers to meet it.

Resolutions of the judges under 6 & 7 Will. 4, c. 114.

§ 479. The principles laid down by the judges in *Queen Caroline's case* were rather extensively applied. After the passing of the 6 & 7 Will. 4, c. 114, which allowed prisoners on trial for felony to make their full defense by counsel, twelve of the judges, having assembled to choose the spring circuits of 1837, agreed to the following, among other resolutions:¹

"1. Where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-

¹ 7 C. & P. 676.

examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

"2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness, as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments on any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

[* 607] *"3. The witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such a statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's

evidence, and the counsel for the prosecution will be entitled to reply."

Practice since those resolutions.

§ 480. Although these resolutions were not binding per se, not being the decision of a court in a judicial proceeding, they were followed in practice. And in order to prevent any evasion of them it was held that a witness could not be asked on cross-examination, if he had ever made a statement inconsistent with his evidence in chief; but that the question must be guarded with the saving clause, that the party interrogating was not referring to what might have taken place before the committing magistrate,¹ or coroner,² as the case might be. The anticipating *possible* objections has been truly designated by C. J. Hale, "leaping before one comes to the stile."³ Suppose the witness, instead of making the inconsistent statement on his examination before the committing magistrate or coroner, had made it by matter of record, or by deed, or even by letter, his parol account of it would, according to **Queen Caroline's case*, be inadmissible; still it was not thought necessary [* 608] to require the cross-examining counsel to negative these various hypotheses by the mode of putting his questions. Another question had also arisen. Although a witness could not be asked what he said before the committing magistrate, unless either his deposition was put in evidence, or it was proved that the testimony given by him on that occasion was not taken down in writing; if the witness had *signed* the deposition so made by him, might

¹ *R. v. Shellard*, 9 C. & P. 277.

² *R. v. Holden*, 8 C. & P. 606.

³ 1 Ventr. 217.

a cross-examining counsel at the trial put it into his hand as a memorandum to refresh his memory, and ask him if, after having read it, he persisted in the evidence given by him in chief? This course was allowed in several instances,¹ but was disallowed by some judges,² and disapproved by others;³ and finally by the Court of Criminal Appeal.⁴

Common Law Procedure Act, 1854.

§ 481. The answers of the judges in *Queen Caroline's case*, on which we have been commenting, opposed, as they were, to the most elementary principles of evidence, having for years been denounced by writers on the subject, and latterly by the Common Law Commissioners of 1850,⁵ at length received the condemnation of the legislature. The 17 & 18 Vict. c. 125, s. 24, following almost verbatim the recommendation of those commissioners, enacts: "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the [* 609] *cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided, always, that it shall be competent for the judge, at any time during the trial, to

¹ *R. v. Edwards*, 8 C. & P. 31; *R. v. Tooker*, and *R. v. Wilson*, Salop Sp. Ass. 1849, ex relatione; *R. v. Newton*, 2 Ph. Ev. 516, 10th Ed.; *R. v. Barnet*, 4 Cox, Cr. Ca. 269.

² Per Patterson, J., in *R. v. Newton*, 15 L. T. 26; per Parke, B., in *R. v. Lang*, Kingst. Sp. Ass. 1851, MS.

³ See *R. v. Matthews*, 4 Cox, Cr. Ca. 93.

⁴ *R. v. Ford*, 2 Den. C. C. 245; 5 Cox, Cr. Ca. 184; 3 Car. & K. 113.

⁵ Second Report, p. 20.

require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." By sect. 103, the enactments in this section are extended to every court of civil judicature in England and Ireland, and 28 Vict. c. 18, sects. 1 & 5, extends them to criminal cases.

Secondary evidence — When admissible.

§ 482. It has been already stated, that when the absence of the primary source of evidence has been accounted for, secondary evidence is receivable.¹ The excuses which the law allows for dispensing with primary evidence are, that the document has been destroyed or lost; or that it is in the possession of the adversary, who does not produce it after due notice calling on him so to do; or in that of a party privileged to withhold it, who insists on his privilege; or who is out of the jurisdiction of the court, and consequently cannot be compelled to produce it. Whether a sufficient foundation has been laid for admitting secondary evidence, is often a matter of nicety; and depends on whether sufficient proof has been given of the destruction or loss of the document; whether a notice to produce is required — as, in many cases, the proceedings amount to constructive notice, and in others notice to produce is dispensed with *by statute;² and if so, whether the notice given is [* 610] sufficient in its terms, and has been given in proper time, &c. There are, however, some general principles which should always be borne in mind. First. Whether suffi-

¹ *Supra*, § 472. "Quumque ex ea definitione adpareat, instrumenta rerum gestarum fidei ac memoriæ causâ confici: facile patet, eis amissis, jus non exspirare, nec ullam obligationem perimi, dum alia supersit probandi ratio:" Heinec. ad Pand. pars 4, § 133. See, also, Mascard. de Prob. Concl. 480, N. 4

² *E. g.*, 17 & 18 Vict. c. 104, s. 165.

cient search has been made for a document depends much on its nature and the circumstances of the case,¹ as a useless document may be presumed to have been lost or destroyed, on proof of a much less search, and after a much shorter time, than an important one. This subject is well illustrated in the case of *Gathercole v. Miall*,² which was an action for a libel in a newspaper called "The Nonconformist." In order to prove the circulation of the libel, a witness was called who said he was president of a literary institution, which consisted of eighty members; that a number of "The Nonconformist" was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterward, it was taken (as he supposed) out of the subscribers' room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it had been lost or destroyed. Under these circumstances, the judge at Nisi Prius held that secondary evidence of the contents of the paper was admissible. A new trial having been moved for on the ground that this evidence was improperly received, the Court held the ruling to be right. Alderson, B., in delivering his judgment, says (p. 335): "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case, in the course

[* 611] *of the argument, of the back of a letter. It is quite clear a very slender search would be suffi-

¹ *R. v. East Farleigh*, 6 D. & Ryl. 147; *Gathercole v. Miall*, 15 M. & W. 319; *Richards v. Lewis*, 15 Jur. 512; *R. v. Braintree*, 1 E. & E. 51; *Quilter v. Jorfs*, 14 C. B., N. S. 747.

² 15 M. & W. 319.

cient to show that a document of that description had been lost. If we were speaking of an envelope in which a letter had been received, and a person said, 'I have searched for it among my papers, I cannot find it,' surely that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away, or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members; and where will you stop? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had *bonâ fide* endeavored to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper." Secondly. According to some authorities, the object of a notice to produce is not merely to enable the party served to have the document in court; but also that he may be enabled to prepare evidence to explain, nullify, or confirm it.¹ This notion has, however,

¹ 1 Stark. Ev. 404, 3rd Ed.; *Cook v. Hearn*, 1 Moo. & R. 201; *Exall v. Partridge*, cited *arguendo* in *Doe d. Wartney v. Grey*, 1 Stark. 283.

[* 612] been overruled, after argument and *full review of the cases, by the Court of Exchequer, in a case of *Dwyer v. Collins*; ¹(a) in which it was held that

¹ 7 Exch. 639 ; 16 Jurist, 569.

(a) By the civil law when documents or private writings had been lost by *inevitable accident*, any person having occasion to use them as evidence, was permitted to do so. The mere fact of loss, however, was not enough it was also necessary to be shown that the loss was the result of an inevitable accident. "For instance" says Pothier, 781, "if in the case of a fire, or the pillage of my house, I had lost my papers, among which were the notes of my debtors, to whom I had lent money, or the acquittances for sums which I had paid to my creditors; whatever the amount of such notes or acquittances might be, I ought to be allowed to give parol evidence of the sums which I had lent or paid, *because it is by an unforeseen accident*, and without my fault that I have lost the notes or acquittances, which would have furnished me with written evidence." By *our* law, however, parol proof of the contents of written instruments may be given upon proof of their loss, from whatever cause, whether inevitable accident or sheer carelessness, or the voluntary acts of the party, provided proof is first made that diligent, but unavailing, search has been made for them in the place where they would be most likely to be found, and the evidence of loss and search must be such as to make it apparent that parol evidence is the best evidence in the party's possession, or in his power to produce. *Greeley v. Quimby*, 22 N. H. 335; *Williams v. Jones*, 12 Ind. 561; *Newsom v. Jackson*, 26 Ga. 241; *Morton v. White*, 16 Me. 53; *Conway v. State Bank*, 13 Ark. 48; *Mariner v. Saunders*, 10 Ill. 113; *Reddington v. Gilman*, 1 Bosw. (N. Y.) 235; *Holmes v. Morden*, 12 Pick. (Mass.) 169; *Sanders v. Sanders*, 24 Ind. 133; *Perkins v. Ermel*, 2 Kan. 325; *Chambers v. Hunt*, 22 N. J. 552; *Hussey v. Roquemore*, 27 Ala. 281; *Creed v. White*, 11 Humph. (Tenn.) 549; *Nicholson v. Hilliard*, 2 Murph. (N. C.) 270; *Waller v. School Dist.*, 22 Conn. 326; *Steamboat v. Young*, 3 Iowa, 268; *State v. Gemmell*, 1 Houst. (Del.) 9; *Smith v. Steele*, 1 H. & M. (Md.) 419; *Flynn v. McGonnigle*, 9 W. & S. (Penn.) 79; *Tucker v. Bradley*, 33 Vt. 324; *Pool v. Myers*, 21 Miss. 466; *Bogart v. Green*, 8 Mo. 115; *Ord v. McKee*, 5 Cal. 515; *Diener v. Diener*, 5 Wis. 483. The contents of a paper voluntarily destroyed by a party may, after proof of its destruction, be shown by parol. *People v. Dennis*, 4 Mich. 609; *Riggs v. Taylor*, 9 Wheat. (U. S.) 483; *Orne v. Cook*, 31 Ill. 238; *Adams v. Guice*, 30 Miss. 397; *Dawry v. Logan*, 12 B. Monr. 386; but he must repel every inference of a fraudulent design in its destruction, or such evidence will be rejected. *Joannes v. Bennett*, 5 Allen (Mass.), 169; *Blake v. Fosh*, 44 Ill. 302. When the loss of the original is established, its contents may be proved by the next best evidence attainable, and, if no better evidence exists, by parol. *Granger v. Warrington*, 8 Ill. 299; *Cotton v. Campbell*, 3 Tex. 493; *Greeley v. Quimby*, *ante*; *Newsom v. Jackson*, *ante*. So too when a written instrument that becomes material to

the sole object of such a notice is to enable the party to have the document in court to produce it if he likes, and if he does not, then to enable the opponent to give

be used in evidence is beyond the jurisdiction of the court, verbal evidence of its contents may be given. *Forrest v. Forrest*, 6 Duer (N. Y.), 102; *Ralph v. Brown*, 3 W. & S. (Penn.) 395; *Shorter v. Shepard*, 33 Ala. 648; *Lindly v. Thomas*, 26 Ga. 537; *Moody v. Com.*, 4 Metc. (Ky.) 1; *Burnham v. Wood*, 8 N. H. 334; *Waller v. Crolle*, 8 B. Monr. (Ky.) 11: or when it is in the custody of a person who cannot be compelled to produce it. *Lynde v. Judd*, 3 Day (Conn.), 499; *Blanchard v. Young*, 11 Cush. (Mass.) 341; *Denton v. Hill*, 4 Hayward (Tenn.), 73.

So when a paper is in the possession of the opposite party, if he fails to produce it, after notice to do so, parol evidence of its contents may be given, but notice to produce the paper must first be shown. *Turnpike Co. v. Whiting*, 10 Mass. 327; *Bell v. Hearne*, 10 La. Ann. 515; *Meyer v. Barker*, 6 Binn. (Penn.) 228; and the notice must be reasonable, and before the trial, unless the party has the paper in court. What is a reasonable notice will depend upon the circumstances of the case, the place where the party resides and keeps his papers, and his power to produce it; *Shreve v. Delaney*, 1 Cranch (U. S. C. C.), 499; *Jefford v. Ringold*, 6 Ala. 544; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505; thus, notice to produce books of account, given the evening before the trial, was held sufficient when the party's counting-house was near the court-house; *Shreve v. Delaney*, *ante*; and several days before, though the party lived out of the State. *Jefford v. Ringold*, *ante*; and the same day when the party lived near the court-house; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121; on trial, if the paper is shown to be in court; *Board, etc., v. Fennimore*, 1 N. J. 242; *Atwell v. Miller*, 6 Md. 10; *Anonymous*, Anth. N. P. (N. Y.) 199; *Brown v. Isbell*, 11 Ala. 109; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; otherwise such notice is insufficient; *Barker v. Barker*, 14 Wis. 131; *Durkee v. Leland*, 4 Vt. 612; and the day before even though the paper was in possession of a person eighty miles away; *Cady v. Hough*, 20 Ill. 43; and generally, the sufficiency of the notice in point of time rests in the sound discretion of the court; and in determining the question the court will always consider the distance at which the paper was from the place of trial when the notice was given, the power of the party to produce it within the time, and the importance of the paper upon the issue. *Cummings v. McKinney*, 5 Ill. 57. One notice is sufficient, even though the action is not tried for years after it is given; *Gilmore v. Wale*, Anth. N. P. (N. Y.) 64; *Patten v. Goldsborough*, 9 S. & R. (Penn.) 47; *Jackson v. Shearman*, 6 Johns. (N. Y.) 19; and the notice must be in writing and clearly designate the papers wanted; *Cummings v. McKinney*, *ante*; and may be served either on the party or his attorney. *Den v. McAllister*, 7 N. J. 46; *Brown v. Littlefield*, 7 Wend. (N. Y.) 459.

There are exceptions to the rule requiring written evidence to be produced when it exists, and instances in which parol evidence is regarded as primary.

secondary evidence. "If," said Parke, B., in delivering the judgment of the Court, "this (*i. e.*, the reason suggested by the above authorities) be the true reason, the

Thus, that a person who acts as a public officer, but who has neglected to write the title of his office against his name upon a certificate, was, in fact, a justice of the peace, or was an officer such as he was required to be to discharge a particular duty, although there is a record of his appointment. *Ghent v. Adams*, 2 Ga. 214; *State v. McNally*, 34 Me. 210; *Shultz v. Moore*, 1 McLean (U. S.), 520; *Rhodes v. Selin*, 4 Wash. (U. S.) 715. And generally to prove official character, when the office is a public one. *Scott v. Detroit, etc.*, 1 Doug. (Mich.) 119. So that the plaintiffs, who sue as commissioners, are commissioners in fact, may be proved by parol. *Mundine v. Greenshaw*, 3 Stew. (Ala.) 87. But this does not apply to special officers appointed by the courts, as an executor or administrator. *Williams v. Jarrett*, 6 Ill. 120. When the evidence is distinct from the written contract, *Shields v. Starke*, 14 Ga. 529, that a person is an innkeeper, although there is a record of his license; *Owens v. Wyant*, 3 H. & M. (Md.) 393; when a written instrument, if produced, could not be received as evidence of the matter to which it relates. *Sparks v. Rowle*, 17 Ala. 211. To recover a prize in a lottery, to show that the plaintiff's ticket drew a certain prize. *Morgan v. Minor*, 2 Root (Conn.), 220. To prove a marriage by persons present, in an action for *crim. con.* *Nixon v. Brown*, 4 Blackf. (Ind.) 157. To prove payment of a debt, even where a receipt was given, and also of taxes. *Adams v. Beale*, 19 Iowa, 61; *Keene v. Meade*, 3 Pet. (U. S.) 7; *Dennett v. Crocker*, 8 Me. 239; *State v. Thompson*, 10 Ark. 61; *Kingsbury v. Moses*, 45 N. H. 222. To prove that town officers were duly sworn. *Hathaway v. Addison*, 48 Me. 440. To show who were town officers at a particular time. *Portland v. Kingfield*, 55 Me. 172. So payment of a mortgage, judgment, or contract may be proved by parol, although record evidence exists. *Bank v. Borland*, 5 Ala. 531; *French v. Frazer*, 7 J. J. Marsh. (Ky.) 425. A sale of property under order of court may be proved by parol as a collateral fact. *Rham v. North*, 2 Yeates (Penn.), 117. To prove that at a previous suit a judgment was used in evidence. *Denney v. Moore*, 13 Ind. 418. To show a bailiff's authority to distrain for rent. *Lampson v. Matthew, Harr.* (Del.) 28. To show the date of the filing of articles of association of a railroad company, even though indorsed thereon by the proper officer. *Johnson v. R. R. Co.*, 11 Ind. 280. To show the destination of a ship, although cleared at the custom-house. *Hadden v. People*, 25 N. Y. 373. To prove who are officers of a corporation. *Brown v. Gas Co.*, 21 Wis. 51. To show whether a certain claim was included in an account, without producing the account itself. *Calhoun v. Calhoun*, 37 Miss. 668.

When an instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some act, independent proof *aliunde* is receivable. *Murphy v. People*, 4 Hun (N. Y.), 106. So to prove the time for the arrival and departure of railroad trains at a given station, although there are printed time tables. *R. R. Co. v. George*, 19 Ill. 510. And generally it

measure of the reasonable length of notice would not be the time necessary to procure the document, a comparatively simple inquiry, but the time necessary to procure

may be said, that where the matter involved in a written instrument or document is not directly in issue, and the writing or instrument, if produced, would not be conclusive, and is not, of itself, decisive of the fact necessary to be established ; or if the written evidence is not within the control of either party, parol evidence is admissible without producing the written evidence ; but not where the issue directly involves the subject-matter of the writing, record, or instrument. *Mumford v. Bowne*, Anth. N. P. (N. Y.) 40 ; *Allen v. McNiel*, 1 Mill (S. C.), 459.

The rule is, that the best evidence within the power of the party must be produced, when the same is in any wise involved in, or is material to the real issue ; therefore, if the original writing, document, or record is destroyed, if the party has an attested copy thereof, or any copy, it should be produced and verified by his oath, or the oath of some person who knows it to be a copy ; but if no copy can be produced, the contents may be proved by parol, as of a lost note. *Jones v. Fales*, 5 Mass. 101. Or of a lost process, as an execution. *Linsee v. State*, 5 Blackf. (Ind.) 601. But, in the case of an execution issued by the clerk of a court, the execution book, if one is kept, is regarded as the next best evidence, and proof must be made from that, if in the custody of the clerk. *Ellis v. Huff*, 29 Ill. 449. If a judgment record is destroyed, its contents may be proved by the docket entries and parol ; or if there be no docket entries, then by parol. *Holmes v. Morden*, 12 Pick. (Mass.) 169. So of a writ or other process, *Brown v. Richmon*, 27 Vt. 583 ; a government patent, *Lacey v. Davis*, 4 Mich. 140 ; or any record, *Gove v. Elwell*, 22 Me. 442 ; deeds, *Allen v. Parish*, 3 Ohio, 107 ; *Oliver v. Parsons*, 30 Ga. 391 ; a bond or other specialty, *Kelly v. Riggs*, 2 Root (Conn.), 126 ; so of a forged instrument upon which an indictment is pending, but its destruction or loss must be distinctly proved, *Com. v. Snell*, 3 Mass. 82 ; *State v. Clark*, 40 Vt. — ; so, where parts of a written instrument are so mutilated as to be illegible, the illegible parts may be shown by parol, *Fullis v. Griffith*, *Wright* (Ohio), 303 ; but not when it has been fraudulently mutilated by the party, *Price v. Tallman*, 1 N. J. 447 ; or of the lost portions of a record, *Miltmore v. Miltmore*, 40 Penn. St. 151 ; articles of partnership, *Perry v. Randolph*, 14 Miss. 335 ; a power of attorney, *Livingston v. Rogers*, 1 Cai. Cas. (N. Y.) 27 ; letters, *Farrell v. Brennan*, 32 Mo. 328 ; warrants, *State v. Atherton*, 16 N. H. 203 ; letters of administration, *Smith v. Wilson*, 17 Md. 460 ; mortgages, *Ord v. McKee*, 5 Cal. 515 ; bill of exchange and notarial certificate of protest, *Wright v. Hancock*, 3 Munf. (Va.) 521 ; an order of court, *McLaren v. Birdsong*, 24 Ga. 265 ; books of account, *Thayer v. Barney*, 12 Minn. 503 ; or indeed *any* book, record, writing or document ; but in order to admit such evidence even after proof of loss, the former existence of the paper or document must be clearly proved. *Jack v. Woods*, 29 Penn. St. 375 ; *Kimball v. Morrill*, 4 Me. 368 ; *Millard v. Hall*, 24 Ala. 209 ;

evidence to explain or support it, a very complicated one, depending on the nature of the case and the document itself and its bearing on the cause." And it was accordingly held in that case, that where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice, and in the event of his refusing, the opposite party may give secondary evidence.

Nature of — No degrees of.

§ 483. The expression that secondary evidence of a document is receivable must not be understood to mean that conjectural, or any other form of illegal evidence of it, will be received. Secondary evidence must be *legitimate* evidence, inferior to the primary solely in respect of its derivative character. Thus, the copy of a copy of a destroyed or lost document is not receivable in evidence, even though, as it seems, the absence of the first

Weatherhead v. Baskerville, 11 How. (U. S.) 329; *Fitch v. Bayne*, 19 Conn. 285; *Denn v. Pond*, 1 N. J. 379; *Lomerson v. Hofferma*n, 24 N. J. 674; *Hewes v. Wiswall*, 8 Me. 94; *Downing v. Pickering*, 15 N. H. 344; *Baskin v. Seechrist*, 6 Penn. St. 154; and that it was a genuine instrument and properly executed. *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *Stone v. Thomas*, 12 Penn. St. 209; *Elmdorff v. Carmichael*, 3 Litt. (Ky.) 472; *Kimball v. Morrill*, 4 Me. 368; *Jack v. Woods*, 29 Penn. St. 375; *Dowler v. Cushwa*, 27 Md. 354; *Perry v. Roberts*, 17 Mo. 36; *Hart v. Strode*, 2 A. K. Marsh, (Ky.) 115; and the evidence of the contents of such papers, etc., should be the best the party can produce, and should in any event be such as to leave no reasonable doubt as to the substantial part of the instrument. *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581; and a counterpart or copy of the instrument, duly sworn to, is generally the best substitute. *Coman v. State*, 4 Blackf. (Ind.) 241; *Higgins v. Reed*, 8 Iowa, 298; but if no copy can be had, parol evidence can be given. As to the sufficiency of the proof of loss, the court is to be the judge, and the loss may be proved by the party himself or by any person having made search therefor; but generally, the proof must show that a *bona fide*, faithful and diligent search has been made in the place where the paper was usually kept, and where it would be most likely to be found. *Fletcher v. Jackson*, 23 Vt. 581; *Jackson v. Root*, 18 Johns. (N. Y.) 60; *Cook v. Hunt*, 24 Ill. 535.

copy has been satisfactorily explained.¹ So, previous to the 14 & 15 Vict. c. 99, s. 2, where a document was lost, a copy of it made by the party to the suit was not admissible, unless proved by evidence aliunde to be accurate; for as he was not a competent witness for *himself, so what he wrote could not be evidence for him.² And here it is of the utmost [* 613] importance to remember that there are no *degrees* of secondary evidence.³ A party entitled to resort to this mode of proof may use any form of it; his not adducing, or even willfully withholding some other, likely to be more satisfactory, is only matter of observation to the jury. Thus, the evidence of a witness who has read a destroyed or lost document is perfectly receivable, although a copy or abstract of it is in existence, and perhaps even in court. This rule, so elementary in its nature, was not established until the case of *Doe d. Gilbert v. Ross*,⁴ in 1840; previous to which, however, various dicta were to be found on the subject, and the prevailing opinion was rather the other way.⁵ But that decision is in perfect accordance with the general principles of evidence, and a contrary doctrine would open the widest door to fraud and chicanery. At the trial of the case on the circuit, in order to prove, by secondary evidence, the contents of a marriage settlement, a copy which was tendered having been rejected for want of a stamp, a

¹ *Reeve v. Long*, Holt, 286; *Anon.*, Skinn. 174; *Liebman v. Pooley*, 1 Stark. 167; *Everingham v. Roundell*, 2 Moo. & R. 138; Gilb. Ev. 9, 4th. Ed.

² *Fisher v. Samuda*, 1 Camp. 192-3.

³ *Doe d. Gilbert v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 Scott, N. R. 577; *Brown v. Woodman*, 6 Car. & P. 206.

⁴ 7 M. & W. 102.

⁵ The cases were collected by the author in the *Monthly Law Mag.*, vol. 4, p. 265.

short-hand writer's notes of a former trial at which the settlement was proved were offered and received by the judge. The jury having found for the plaintiff, it was objected before the court in banc that this evidence ought not to have been received, especially as it appeared that a copy of the settlement was in existence; and several of the previous dicta were cited. The court, however, refused even a rule to show cause on this point; Parke, B., in the course of the argument, observing to the counsel, p. 105, "You must contend, then, that there is to be [* 6.4] primary, secondary, and tertiary *evidence. If an attested copy is to be one degree of secondary evidence, the next will be a copy not attested; and then an abstract: then would come an inquiry, whether one man has a better memory than another, and we should never know where to stop." And in delivering judgment the same judge expressed himself thus, p. 107:—"As soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence, that there is any attested copy, or better species of secondary evidence behind. We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable. Does it then become inadmissible, if it be shown from other sources that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power." And Alderson, B., said, "I agree with my brother Parke, that the objection must arise from the nature of the evidence itself. If

you produce a copy which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case, — the existence of an original does not show the existence of any copy ; nor does parol evidence of the contents of a deed show the existence of any thing except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side, at the trial, may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be *in existence unknown to him, and he would [* 615] be bound to account for them all.”¹

¹ In some parts of America they take a sort of middle course about this, which is thus described in 1 Greenl. Ev. § 84, note (2), 7th Ed. “The American doctrine, as deduced from various authorities, seems to be this: that if, from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove that it was known to the other party in season to have been produced at the trial. Thus, where the record of a conviction was destroyed, oral proof of its existence was rejected, because the law required a transcript to be sent to the Court of Exchequer, which was better evidence. A grant of letters of administration was presumed, after proof, from the records of various courts, of the administrator's recognition there, and his acts in that capacity; and where the record books were burnt and mutilated, or lost, the clerk's docket and the journals of the judges have been deemed the next best evidence of the contents of the record. In all these, and the like cases, the nature of the fact to be proved plainly discloses the existence of some evidence in writing, of an official character, more satisfactory than mere oral proof; and therefore the production of such evidence is demanded. But where there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not inadmissible by other rules of law; unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud, which the law itself presumes when primary evidence is withheld.”

*Exceptions to the rule requiring primary evidence—
Where production physically impossible—Where
highly inconvenient on physical grounds.*

§ 484. There are several exceptions to the rule which requires primary evidence to be given. The following are the principal: First, where the production of it is physically impossible, as where characters are traced on a rock: or, secondly, where it would be highly inconvenient on *physical* grounds; as where they are engraven on a tombstone,¹ or chalked on a wall or building,² or contained in a paper permanently fixed to it,³ (a) &c.

Where on moral grounds—Public documents.

[* 616] *§ 485. 3. The most important and conspicuous exception, however, is with respect to the proof of records,⁴ and other public documents of general

¹ *Tracy Peerage case*, 10 Cl. & F. 154.

² *Mortimer v. M'Callan*, 6 M. & W. 58, 63 and 68; *Sayer v. Glossop*, 2 Exch. 411, per Rolfe, B. *Bruce v. Nicolopulo*, 11 Exch. 129.

³ *R. v. Fursey*, 6 C. & P. 84; *Jones v. Tarleton*, 9 M. & W. 675.

⁴ *Dr. Leyfield's case*, 10 Co. 92 b; Doct. Placit. 201, 206; *Leighton v. Leighton*, 1 Str. 210.

(a) A contract, deed, or any document written in a foreign language cannot be given in evidence unless it is translated, and the translation of the original instrument must be made or sworn to on the trial, by a person competent to make such translation and who verifies its correctness by his oath. *Meyer v. Witter*, 25 Mo. 83.

It is not necessary in order to make a writing admissible in evidence that it should be written upon paper, parchment or any of the materials usually employed for that purpose; it is sufficient if written or cut upon wood, stone or any other material, if its execution and purpose can be clearly proved. *Kendall v. Field*, 14 Me. 80.

Entries of an account, transferred from a slate to a day book or ledger, are treated as *original* entries. *Ewart v. Morrell*, 5 Harr. (Del.) 126; *Landis v. Turner*, 14 Cal. 573.

concernment ;¹ the objection to producing which rests on the ground of *moral*, not physical inconvenience. They are, comparatively speaking, little liable to corruption, alteration, or misrepresentation — the whole community being interested in their preservation, and, in most instances, entitled to inspect them ; while private writings, on the contrary, are the objects of interest but to few whose property they are, and the inspection of them can only be obtained, if at all, by application to a court of justice. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes ; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use soon insure their destruction. For these and other reasons,² the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual. But, true to its great principle of exacting the best evidence that the nature of the matter affords, * the law requires this derivative evidence to be of a very trustworthy kind ; and has defined [* 617]

¹ *Mortimer v. M'Callan*, 6 M. & W. 58 ; *Lynch v. Clarke*, Holt. 293 ; 3 Salk. 154. See *infra*.

² It is said in some books that the reason why records may be proved by a copy is, that no rasure or interlineations shall be intended in them. *Dr. Leyfield's case*, 10 Co. 92 b ; B. N. P. 227. But though this may be one reason, it is neither the only nor the principal one. The actual record must be produced on an issue of nul tiel record in the same court ; and although it is a *præsumptio juris et de jure* that officers of courts of justice make up their records accurately, and keep them from being tampered with, so strong a presumption could hardly be made in favor of public books and documents not of a judicial character.

with much precision the forms of it which may be resorted to in proof of the different sorts of public writings.¹ Thus it must, at least in general, be in a *written* form, *i. e.*, in the shape of a copy, &c., and, as already mentioned, must not be a copy of a copy. In very few, if in any, instances is *oral* evidence receivable to prove the contents of a record or public book which is in existence.

Different sorts of copies used for proof of documents.

§ 486. The principal sorts of copies used for the proof of documents are: 1. Exemplifications under the great seal; 2. Exemplifications under the seal of the court where the record is; 3. Office copies, *i. e.*, copies made by an officer appointed by law for the purpose; 4. Examined copies. An examined copy is a copy sworn to be a true copy, by a witness who has compared it line for line with the original, or who has examined the copy while another person read the original. The document must be in a character and language that the witness understands,² and he must also have read the whole of it.³ According to most authorities, when the latter of the above modes of examination is resorted to, it

¹ At first sight this may appear at variance with the maxim that there are no degrees in secondary evidence; but it does not fall within its principle. *E. g.*, a party wants to prove the contents of a *private* document in the possession of his adversary, who refuses to produce it; and for this purpose calls a witness, who offers to state its contents from memory. How unjust would it be if the opposite party could exclude this evidence, by showing that a copy of the document was in existence, and which perhaps was even made the day before the trial, with the view of enabling him to raise the objection. See *suprà*, § 483. But this reasoning cannot apply in the case of a *public* document, which is kept in a known place, where every one may inspect and obtain a copy of it.

² *Suprà*, § 483.

³ *Crawford Peerage case*, 2 Ho. Lo. Cas. 544-5.

⁴ *Nelthrop v. Johnson*, Clayt. 142, pl. 259.

is unnecessary to call both the persons engaged in it, * or that they should have alternately read and inspected the original and copy; for that it [* 618] ought not to be presumed that any person would willfully misread a record.¹ But in a modern case before a committee of privileges of the House of Lords, where, in order to prove a memorandum roll in the Court of Exchequer in Dublin, a witness produced a copy of the roll, which he said he had compared with the original, according to the usual custom of the office—the clerk in the office holding the original and reading it, while the witness held the copy, without changing hands—and what he heard the clerk read corresponded with what the witness saw in the copy, the committee held that this practice was incorrect; that the witness could not swear that the document produced was a close copy, and therefore it could not be received; that it was important it should be known that copies must be compared in a different manner, viz., by changing hands. The same witness on producing a copy of a statute roll having said that, besides comparing it in the usual way in the office, he read it with the original himself, the document was received as evidence.² The rule laid down in that case is not, however, always followed in practice. 5. Copies signed and certified as true, by the officer to whose custody the original is intrusted; 6. Photograph copies:—of all others the best for showing any peculiarities that exist in the original document, and consequently invaluable in cases turning on those peculiarities; as, for instance, when the original is suspected of having been tampered with after the copy has been taken, &c. An

¹ *Rolfe v. Dart*, 2 Taunt. 52; *Giles v. Hill*, 1 Campb. 471, note.

² *Slane Peerage case*, 5 Cl. & F. 42.

examination of the cases, in which these various species of copies may be used as proof of public or other documents, would be altogether foreign to a work like the present; suffice it to say that there are a few instances where none of them is receivable, and the original [* 619] * must be produced. Of these the principal is where the gist of a party's action or defense lies in a record of the court where the cause is, and issue is joined on a plea of nul tiel record. Here it is obvious that the reasons which plead so strongly for allowing inferior evidence to prove records, &c.,¹ do not apply: "Cessante ratione legis cessat ipsa lex."²

Proof of public documents.

§ 487. Public documents, though not of a judicial nature; such as registers of births, marriages and deaths;³ the books of the bank of England,⁴ or of the East India Company;⁵ bank bills on the file at the Bank,⁶ &c., are, in general, provable by examined copies. And by 14 & 15 Vict. c. 99, s. 14, it is enacted, that "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law or by consent of parties,

¹ *Suprà*, § 485.

² Co. Litt. 70 b.

³ *Lynch v. Clarke*, Holt, 293; 3 Salk. 154; *Sayer v. Glossop*, 2 Exch. 409.

⁴ *Mortimer v. M'Callan*, 6 M. & W. 58.

⁵ *Shelling v. Farmer*, 1 Str. 646; note to the case of *R. v. Lord Geo. Gordon*, 2 Dougl. 593.

⁶ *Man v. Cary*, 3 Salk. 155.

authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified, as a true copy or extract, by the officer to whose custody the original is intrusted."(*a*)

(*a*) Books, newspapers and other printed matter are generally not admissible except where the issue relates to them, or to prove compliance with some statute or order of court, or notice of some fact contained therein, or to qualify or contradict the statement of the author under oath, or the other party has admitted some statement therein to be true; *Harmer v. Morris*, 1 McLean (U. S.), 44; *Beebe v. Le Baun*, 8 Ark. 510; thus it has been held that the printed report of a decision of the higher courts is not admissible to prove any fact stated therein; *Barbour v. Archer*, 2 A. K. Marsh. (Ky.) 9; or a public statute, printed by a private printer, as evidence of the laws of another State, unless duly certified by the proper officer. *Canfield v. Squire*, 2 Root (Conn.), 300; *Bostwick v. Bogardus*, id. 250.

Neither can historical facts be proved by the production of a history written by a person who is still living, and whose evidence can be procured; *Mowris v. Harmer*, 7 Pet. (U. S.) 554; *Woods v. Banks*, 14 N. H. 101; nor can medical or scientific works generally be admitted as evidence in a case, even though written by authors well known to be entitled to consideration as authority upon the particular subjects involved; *Harris v. Panama R. R. Co.*, 3 Bosw. (N. Y.) 7; *Fowler v. Lewis*, 25 Tex. 380; *Carter v. State*, 2 Ind. 617; *Ashworth v. Kittredge*, 12 Cush. (Mass.) 193; but, *contra*, see *Meckle v. State*, 37 Ala. 139; *Bowman v. Woods*, 1 Gr. (Iowa), 441; but it seems that the court may, in its discretion, admit such evidence, and its admission on the one hand or rejection on the other is not error. *Wale v. DeWitt*, 20 Tex. 398; *Luning v. State*, 1 Chand. (Wis.) 178.

It has been held that the *Gazetteer* of the United States is not admissible to prove the distance from one place to another; *Spaulding v. Hedges*, 2 Penn. St. 240; nor the catalogue of students in a school or college; *State v. Daniels*, 44 N. H. 383; nor an advertisement in a newspaper to show that a note was illegally obtained; *Ring v. Huntingdon*, 1 Mills (S. C.), 162; or for any purpose when the manuscript from which it was copied is not accounted for; *McCorkle v. Binns*, 5 Binn. (Penn.) 340; *Swigart v. Lowmarter*, 14 S. & R. (Penn.) 200; nor to show the death of a person; *Fosgate v. Herkimer Manuf. Co.*, 9 Barb. (N. Y.) 287; but the state of the markets at a given time may be shown by newspapers of that date containing "prices current;" *Cliquot's Champagne*, 3 Wall. (U. S.) 114; *Henkle v. Smith*, 21 Ill. 238; *Sisson v. Cleveland R. R. Co.*, 14 Mich. 489; or facts of general interest; *Stringer v. Davis*, 35 Cal. 25; or an advertisement in a newspaper offering a reward for a certain thing; *Lee v. Flemingsburgh*, 7 Dana (Ky.), 21; but in order to render it admissible it must first be shown to have emanated from the person sought to be charged

Special modes of proof of public documents provided by modern statutes — In general cumulative, not substitutory.

§ 488. By several modern acts of parliament, special modes of proof are provided for many kinds of records and public documents. By "The Documentary Evidence Act, 1868,"¹ sect. 2, it is enacted as follows: "*Primâ* [* 620] **facie* evidence of any proclamation, order, or regulation issued before or after the passing of this act by her majesty or by the privy council, also of any proclamation, order, or regulation issued before or after the passing of this act, by or under the authority of any such department of the government, or officer as is mentioned in the first column of the Schedule hereto,"

¹ 31 & 32 Vict. c. 37. Subject to any law that may from time to time be made by the legislature of any British colony or possession, this act is to be in force in every such colony and possession; sect. 3.

² *I. e.* :—

The Commissioners of the Treasury ;
The Commissioners for executing the Office of Lord High Admiral ;
Secretaries of State ;
Committee of Privy Council for Trade ;
The Poor Law Board.

thereby ; *Somerwell v. Hart*, 3 H. & M. (Md.) 596 ; *Mann v. Russell*, 11 Ill. 586 ; and this may be done *primâ facie* by showing that the advertisement appeared in a newspaper circulating in the neighborhood where the party lives, when the manuscript from which it was printed is lost ; *Swigart v. Lowmarter*, 14 S. & R. (Penn.) 200 ; so the time of the arrival and departure of public conveyances at a particular date, at a particular place, may be proved by a newspaper printed in the town at the date in question ; *Com. v. Robinson*, 1 Gray (Mass.), 555 ; or to prove a notice under the statute, or an order of court ; *Sweet v. Avaunt*, 2 Bay. (S. C.) 492 ; and generally, the court may exercise its discretion in reference to the admission of all such evidence, either to establish a substantial fact, or a collateral issue, where the party sought to be charged thereby is connected with the publication in such a manner as to render it in any wise evidence against him.

may be given in all courts of justice, and in all legal proceedings whatever, in all or any of the modes hereinafter mentioned, that is to say:—

“1. By the production of a copy of the ‘Gazette’ purporting to contain such proclamation, order, or regulation.

“2. By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

“3. By the production, in the case of any proclamation, order, or regulation issued by her majesty or by the privy council, of a copy or extract purporting to be certified to be true by the clerk of the privy council, or by any one of the lords or others of the privy council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true, by the person or persons specified in the second column of the said Schedule in connection with such department or officer.’

* “Any copy or extract made in pursuance of this act may be in print or in writing, or partly [* 621] in print and partly in writing.

¹ *I. e.* :—

Any Commissioner, Secretary, or Assistant Secretary of the Treasury ;

Any of the Commissioners for executing the Office of Lord High Admiral, or either of the Secretaries to the said Commissioners ;

Any Secretary or Under Secretary of State ;

Any member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee ;

Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.

“No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this act, to the truth of any copy of or extract from any proclamation, order or regulation.”

By the 7th section of the statute 14 & 15 Vict. c. 99, it is enacted, that “All proclamations, treaties and other acts of state, of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, [* 622] must purport either to be sealed *with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the

aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." The 12th section relates to proof of the register of British vessels. And by sect. 13, "Whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offense, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

The 8 & 9 Vict. c. 113, s. 3, enacts, "All copies of private and local and personal acts of parliament not public acts, if purporting to be printed by the queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the crown or by the printers * to either house of parliament, or by any or either of them, shall be admitted as evidence [* 623] thereof by all courts, judges, justices, and others, with-

out any proof being given that such copies were so printed.”

Of these and similar enactments, of which a large number are to be found in the recent statute books, it is to be observed, that in general they are *cumulative* not *substitutionary*: *i. e.*, they do not abolish the common-law mode of proof, and only provide a more easy or summary one, of which parties may, if they please, avail themselves.¹

Appointments of public officers.

§ 489. 4. Another exception is in the case of public officers. It is a general principle that a person's acting in a public capacity is *prima facie* evidence of his having been duly authorized so to do; and even though the office be one the appointment to which must be in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production. The grounds of this have been examined in another place.²

Examinations on the voir dire.

§ 490. 5. Where a witness is being interrogated on the *voir dire* with the view of ascertaining his competency, if that competency depends on written instruments he may state their nature and contents.³

Circumstantial evidence not affected by the rule requiring primary evidence—Nor self-dis-serving evidence.

§ 491. The principle of the rule in question being that the secondary evidence borrows its force from the primary, of which, owing to the general infirmity of all

¹ See 31 & 32 Vict. c. 37, s. 6.

² *Suprà*, ch. 2, sect. 2, sub-sect. 4, § 356.

³ Tayl. Ev. §§ 483 & 1242, 4th Ed. See also per Maule, J., in *Macdonnell v. Evans*, 11 C. B. 930.

derivative proof, it may not be perfect representation, it follows that *circumstantial* evidence, when original * and proximate in its nature, is not affected by the rule.¹ It is evidence in the *direct*, not in [* 624] the *collateral* line, which falls within the exclusion. For the same reason it seems — although much has been said and written on both sides of the question — that *self-disserving* statements by a party, against his own interest, are receivable as primary proof of documents ; but this will be considered under the head of self-regarding evidence.²

* CHAPTER IV.

[* 625]

DERIVATIVE EVIDENCE IN GENERAL.

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¹ Bk. 1, pt. 1, § 88 *et seq.*, and *suprà*, ch. 1, § 295. ² *Infra*, ch. 7.

Infirmity of derivative or second-hand evidence — Forms of it.

§ 492. The infirmity of derivative or second-hand evidence, as compared with its original source, has been shown in the Introduction to this work;¹ and the danger of this kind of proof increases according to *its [* 626] distance from that source, and the number of media or instruments through which it comes to the cognizance of the tribunal.² The five following forms of it were there enumerated: 1. Supposed oral evidence, delivered through oral; 2. Supposed written evidence, delivered through written; 3. Supposed oral evidence, delivered through written; 4. Supposed written evidence, delivered through oral; 5. Reported real evidence. The last of these,³ and the secondary evidence of documents which would be evidence if produced,⁴ have been already considered; and the present chapter will be devoted to the admissibility of derivative evidence in general.

General rule, not receivable as evidence in causâ — Reasons commonly assigned for this.

§ 493. The general rule is that derivative or second-hand proofs are not receivable as evidence *in causâ* — a rule which forms one of the distinguishing features of our law of evidence,⁵ and the gradual establishment of which has been already traced.⁶ The reasons commonly

¹ Introd. pt. 1, §§ 29, 30; pt. 2, § 51.

² Introd. pt. 1, §§ 29 and 30.

³ See bk. 2, pt. 2, § 198.

⁴ See the preceding chapter.

⁵ Introd. pt. 1, § 29, and bk. 1, pt. 1, § 89.

⁶ Bk. 1, pt. 2.

assigned for it are: 1. That the party against whom the proof is offered has no opportunity of cross-examining the original source whence it is derived;—but this will not explain the rejection of second-hand evidence when it comes in a written form; 2. That, assuming the original evidence truly reported, it was not itself delivered under the sanction of an oath. To this the same objection may be made: besides, the derivative evidence would not be the more receivable, if the original evidence were delivered under that sanction; for the statement of a third party made on oath, even in *judicio*, is not evidence against a person who was no party to the judicial proceeding.

True grounds of.

§ 494. The foundations of the rule lie much deeper *than this. Instead of stating as a maxim that the law requires all evidence to be given *on* [* 627] *oath*, we should say that the law requires all evidence to be given *under personal responsibility*; *i. e.*, every witness must give his testimony under such circumstances as expose him to all the penalties of falsehood which may be inflicted by any of the sanctions of truth.¹ Now, oaths, so far from being the sole sanction of truth, are only a particular, although doubtless very effective, application of *one*, namely, the religious sanction;² and if they were abolished, the rule rejecting second-hand evidence ought to remain exactly as it is. Indeed, several classes of persons are excused by statute from taking oaths,³ and their evidence, given on solemn affirmation, stands on the same footing with relation to admissibility as if

¹ Introd. pt. 1, §§ 16 *et seq.*

² Introd. pt. 2, §§ 56 *et seq.*

³ See bk. 2, pt. 1, chap. 2, § 166.

they had been sworn. The true principle, therefore, appears to be this—that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected. And this will explain a matter which at first view seems anomalous; namely, that the principle governing *secondary* does not extend to *second-hand* evidence; for in the latter case, no matter how unanswerably the absence of the original source is accounted for, the inferior evidence will not be received. Thus, what A. (a witness) has heard B. (a stranger) say, is not only not admissible in the first instance, but the clearest proof of the death, or of the complete and incurable lunacy of B., would not render it admissible. The reason is that, in the one case, the primary source being perfect in itself, and receivable in evidence if produced, so soon as that source is exhausted, the evidence offered is simply derivative of it, and excludes all possible chances of error [* 628] except those which may be found in the medium of evidence used. But when the document is one which would not be evidence if produced, as not being traced to the party against whom it is offered; or where the proof tendered consists of the statement of a person who cannot be subjected to cross-examination, the primary source is not exhausted, and derivative proof is rightly rejected.

Maxim "hearsay is not evidence"—Inaccuracy of it—Hearsay often confounded with res gestæ—Common rumor, when evidence.

§ 495. The rule in question is commonly enunciated, both in the books and in practice, by the maxim, "hear-

say is not evidence,"—an expression inaccurate in every way, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind; first, directly, that what a person has been heard to say is not receivable in evidence; and, secondly, by implication, that whatever has been committed to writing, or rendered permanent by other means, is receivable—positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest is not only receivable, but is the very best evidence against him;¹ and on the other, as already stated,² written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with *res gestæ*, *i. e.*, the original proof of what has taken place; and which the least reflection will show may consist of *words* as well as of *acts*. Thus, on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be;³ and so are the cries of a woman who is being ravished.⁴ So, where an action on a policy of insurance, effected by a deceased person on his own *life, was defended on the ground that he had no interest in the policy; evidence that, pre- [* 629] vious to effecting the insurance, the deceased had consulted another person on the subject of insuring his own life, was held to be admissible as part of the *res*

¹ See *infra*, ch. 7.

² *Suprà*, § 494.

³ Case of *Damaree and Purchase*, Fost. Cr. Law, 213; 15 Ho. St. Tr. 522; *R. v. Lord George Gordon*, 21 Ho. St. Tr. 514, 529.

⁴ See Mascard. de Prob. Concl. 23, N. 1.

gestæ.¹(a) So, although the relation of what a stranger has been heard to say will be rejected, if offered as evidence of the truth of his words, seeing that it comes *obstet-*

¹ *Shilling v. The Accidental Death Company*, 4 Jurist, N. S. 244, per Erle, J. And see *Milne v. Leisler*, 7 H. & N. 786.

(a) It is a well-settled rule of evidence that the declarations and acts of the principal parties to an act, as well as the circumstances surrounding them, at the time of the principal fact, may be given in evidence in a controversy between the parties relative thereto as a part of the *res gestæ*, which are calculated to show the nature of the act, and are in harmony with it. But in order to be admissible they must be immediately connected with the material inquiry involved in the issue, and must have occurred at the *time* of the transaction, or if not precisely concurrent, so closely connected therewith that they may be said to spring from it, and thus tend to explain it. They must be so closely connected with the principal act in point of time as to be spontaneous and voluntary, and to preclude all possible idea of deliberate design. Indeed, it has been said that the declarations or acts must be the natural or inseparable concomitants of the principal fact in controversy, so that they may be presumed to have been induced by the same motive that led to the act itself, and so closely allied thereto in point of time as obviously to form a part of the transaction, and must be calculated to unfold its nature and quality. If there is any thing which raises a suspicion that they were intended to deceive, and were made or done in bad faith, the court not only *may*, but should, exclude them; *Riggs v. State*, 6 Cold. (Tenn.) 517; *Elkins v. Hamilton*, 20 Vt. 627; *Carter v. Buchanan*, 3 Ga. 513; *Fifield v. Richardson*, 34 Vt. 410; *Atherton v. Tilton*, 44 N. H. 452; *Meek v. Perry*, 36 Miss. 190; *Springer v. Droach*, 32 Ind. 486; 2 Am. Rep. 356; *Crowther v. Gibson*, 19 Md. 365; *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36; *Koch v. Howell*, 6 W. & S. (Penn.) 350; *Clayton v. Tucker*, 20 Ga. 452; *Curtis v. Avon, etc., R. R. Co.*, 49 Barb. (N. Y.) 148; *Stewart v. Hanson*, 35 Me. 506; *Franklin v. Woodford*, 14 La. Ann. 188; *Clark v. Rush*, 19 Cal. 393; *Russell v. Frisbee*, 19 Conn. 205; and this is applicable to actions civil or criminal; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 28; *Campbell v. U. S.*, S. Ct. of Cl. 240; *Bank v. Kennedy*, 17 Wall. (U. S.) 19; *People v. Brotherton*, 47 Cal. 388; *Sill v. Reese*, id. 294; *Landell v. Hotchkiss*, 4 N. Y. Sup. Ct. 685; *Burlew v. Hubbell*, 1 id. 235; *Parker v. R. R. Co.*, 109 Mass. 449; *Jordan v. Osgood*, id. 457.

In a recent case decided in the court of Common Pleas in the State of Pennsylvania, *Stern v. Railway Co.*, Weekly Notes of Cases, No. 44, page 531, the plaintiff brought an action against the defendant for injuries inflicted by it upon his minor son, producing death, by reason of the alleged carelessness of the defendant. The son, after the injuries were inflicted, was taken to the hospital, where he died within two days after the injuries were received by him.

ricante manu; yet whether certain words were spoken is a *fact*, and may be proved as such, if relevant to the issue raised. Thus, although common rumor cannot be received

The defendant shew by a policeman that the son, within two hours after the accident, told him that he was not pushed off from the car, but that his cousin, who was on the car with him, frightened him and he jumped off. The plaintiff objected to this evidence, but it was admitted; and upon exceptions the ruling of the court below was sustained upon the double ground: 1st, That the declarations of the boy were, in this instance, admissible as admissions of a party; and 2d, As a part of the *res gestæ*.

It will be observed that in this case the declarations of the boy, which the court treated as a part of the *res gestæ*, were not concurrent in point of time with the original transaction, nor so intimately connected therewith as to form a part of it, except for the fact that the boy was suffering from the effects of the injuries resulting therefrom; nor do any of the cases referred to by the court as authorities sustain its ruling upon this point. Had an action been pending in favor of the boy, declarations made by him as to his condition would have been admissible upon the question as to the extent of his bodily injury; but I know of no case where such evidence has been held admissible upon the question of the *cause* or *manner* of the injury. In *Brownell v. Pacific R. R. Co.*, 49 Mo. 239, the plaintiff's husband was injured upon the defendant's road, and died almost instantly, from the effects of the injury; and the court held that his declarations, as to the cause and manner of the accident, made under such circumstances, were admissible as a part of the *res gestæ*; but they put their decision upon the express ground that the declarations were so intimately blended with the accident itself, that it could not be said in any sense to be detached from it. The fact that the declarations were made the same day that the accident happened, has no bearing upon the question. The simple test is, whether the accident and declarations could be fairly said to have been detached from each other; and without intending any disrespect to the court, I cannot but think that the doctrine announced by it is not only a dangerous one, but one which has no foundation upon any well-recognized authority.

The entire value of this class of evidence depends upon its spontaneity, and is predicated upon the idea that being spontaneous, springing from the act itself, and forming a part of it in point of time, before any idea of deliberate design or purpose to make evidence for each other has entered the minds of the parties, it tends to explain and throw light upon the transaction itself. Therefore it is that the declarations of a party who has been injured and is suffering from the effects of the injury, made during the time while he or she is suffering from the effects of it, are admissible upon the question as to the nature and extent of such suffering, but *never* upon the question as to its *cause*; *Illinois, etc., R. R. Co. v. Sutton*, 42 Ill. 438; *Gray v. McLaughlin*, 26

as proof of a fact—being hearsay in one of its worst forms—yet, when the conduct of a person is in question, evidence as to whether a certain rumor had reached his

Iowa, 279; Hall v. State, 48 Ga. 607; Bassham v. State, 38 Tex. 622; Jex v. Board of Education, 1 Hun (N. Y.), 157.

That declarations made by a party after the transaction is ended, or an injury is received, so far detached therefrom in point of time as to admit of deliberate design, or as to be fairly detached from the transaction to which they relate, are not regarded as a part of the *res gestæ*, see Lane v. Bryant, 9 Gray (Mass.), 245; Smith v. Webb, 1 Barb. (N. Y.) 230; McAdams v. Brand, 35 Ala. 478; Osborn v. Robbins, 37 Barb. (N. Y.) 481; Simms v. Macon, etc., R. R. Co., 28 Ga. 94; Nelson v. State, 2 Swan (Tenn.), 237; Detroit, etc., R. R. Co. v. Van Steinberg, 17 Mich. 99; Com. v. Harwood, 4 Gray (Mass.), 41; State v. Jackson, 17 Mo. 544; Wilson v. Sherlock, 36 Me. 295; Stewart v. Reddett, 3 Md. 67; Cherry v. McCall, 23 Ga. 198; Carter v. Buchanan, 3 id. 513; People v. Graham, 21 Cal. 261; Luby v. Hudson River R. R. Co., 17 N. Y. 131; Monday v. State, 32 Ga. 672; Matteson v. N. Y., etc., R. R. Co., 35 N. Y. 487; Kinnard v. Burton, 25 Me. 39; Com. v. McPike, 3 Cush. (Mass.) 181; State v. Dominique, 30 Mo. 585.

Indeed, in Friedman v. R. R. Co., 7 Phil. (Penn.) 203, it was held expressly that even the dying declarations of the deceased, as to the *cause* of his injuries, could not be given in evidence in an action for negligence. See, also, Marshall v. Chicago, etc., R. R. Co., 48 Ill. 475.

In Lambert v. The People, 29 Mich. 71, the court admitted statements made by a person who had been robbed, made to persons coming up to him within three minutes after the commission of the crime, as a part of the *res gestæ*.

But if such a time had elapsed as to detach the statements, in point of time, from the transaction itself, the evidence would not have been admissible. Thus, in Hamilton v. People, 29 Mich. 171, for burning a barn, it was held that statements made by the respondent after the fire were not admissible.

While it is not my purpose to discuss general questions in this note, I still feel it my duty to say that it is quite difficult to see upon what principle the statements of the son, in the case of Stern v. Railway Co., *ante*, could be regarded as competent evidence, even as *admissions*. The son had no interest in the subject-matter of the action; he could not have released the defendant from its liability to respond to the plaintiff in damages, and was in no sense privy in interest, so as to be able to admit away the plaintiff's cause of action. There was no common-law liability upon the defendant, but a statutory remedy given to the father; and the personal representatives of the son could not maintain an action for the particular matter which constituted the foundation of the plaintiff's action. Then in what sense can the son, in such a case, be said to be *privy in interest* with the father, so as to make his admissions evidence against the father in such an action?

This precise question arose in the case of the Ohio R. R. Co. v. Hammersley, 28 Ind. 371, which was an action brought by the father for injuries resulting

ears at a particular time, may be perfectly receivable. We are not to consider whether evidence comes by word of mouth or by writing, but whether it is original in its

¹ 2 Inst. 52; T. 1 Edw. II. 12, tit. Imprisonment; *Jones v. Perry*, 2 Esp. 482; *Thomas v. Russell*, 9 Exch. 764. See Goodeve, Evidence, 423.

in the death of the son. In that case the defendant (plaintiff in error) attempted to prove admissions made by the deceased son shortly after the injury, showing that it was not responsible for the injury. But the court held that the evidence was not admissible, pertinently remarking: "The son could not admit away the cause of action; nor could he — without regard to the question of minority — have released the company from any liability incurred by it to the father. If he had survived the injury, he would have been a competent witness to prove the facts, *but his previous admissions could only have been used to impeach his evidence.* In an action brought by the son or his personal representatives, such statements would have been properly introduced as an admission against himself;" but in an action to which the son or his personal representatives could not be parties, and in which they have no interest, there is no rule of evidence which would make such testimony admissible. The very principle upon which the rule of law making admissions evidence rests, is, that they are made by a party against his interest; and, in order to be admissible, they must be made at a time when he stands in such a relation to the subject-matter of the action that he could release it. The mere fact that it arises through some cause with which he is connected; that he is, in fact, the originating cause of the action, is not enough; he must be so connected with it, at the time when the admissions were made, that he could release the cause of action itself. This doctrine was recognized in the case of *Stilwell v. N. Y., etc., R. R. Co.*, 34 N. Y. 29, which was an action brought by a husband for personal injuries inflicted upon his wife by the defendant. In that case the defendant offered evidence of admissions, made by the wife *at the time of the accident*, that the conductor of the train was not negligent. The court held that the admissions of the wife were not admissible as evidence in an action in favor of the husband. She was not a privy in interest, so that her admissions were binding upon him, even though the cause of action was for personal injuries inflicted upon her. *Cane v. People*, 3 Web. 357; *Carrig v. Oaks*, 110 Mass. 145; *Mobile, etc., R. R. Co. v. Ashcroft*, 48 Ala. 15.

As to the privity of interest that must exist in order to make admissions admissible, see *Hill v. Myers*, 43 Penn. St. 170; *Com. v. Oberle*, 3 S. & R. (Penn.) 9; *Faulkner v. Whittaker*, 15 N. J. 438; *Atwell v. Miller*, 11 Md. 348; *Pringle v. Pringle*, 59 Penn. St. 281; *Bunker v. Green*, 48 Ill. 243; *Hartman v. Diller*, 62 Penn. St. 67; *Eakle v. Clarke*, 30 Md. 322.

In *Mitchum v. The State*, 11 Ga. 615, the rule as to what facts may be given as a part of the *res gestæ* was thus stated: "To make declarations a part of the *res gestæ*, they must be contemporaneous with the main fact; but in order

to be contemporaneous they are not required to be *precisely* concurrent in point of time. If the declarations spring out of the transaction — if they elucidate it — if they are voluntary and spontaneous, and *if they are made at a time so near to it, as reasonably to preclude the idea of deliberate design*, they are then to be regarded as contemporaneous.” The reason for this rule is apparent. That which properly is admissible as a part of the *res gestæ* is admissible *for* as well as *against* the party making the declaration or doing the acts claimed to form a part of the transaction, and nothing can properly be permitted, which is not so intimately blended with the transaction itself as to wholly preclude the idea that the party was seeking to make evidence for himself. Now in this case (*Stern v. Railway Co.*), if the son had survived and had brought an action for personal injuries against the defendant, would the court have permitted him to show that within two hours after the injury he had stated to the policeman that the injury resulted from the overcrowded condition of the car? I apprehend not; yet the one declaration, as a part of the *res gestæ*, is as admissible as the other. The fact that the son died, and that the declaration was made by him when *in extremis*, gives it no additional weight or consideration as a part of the *res gestæ*. A period of time had elapsed between the declaration and the transaction itself, which detached the one from the other.

In reference to acts or declarations forming a part of the *res gestæ*, it must be remembered that they are admissible *for* as well as *against* a party; hence it is that courts have exercised extreme caution not to admit such acts or declarations as arise so long after the transaction to which they relate, that an opportunity is given for deliberate design in manufacturing evidence; and the fact that the declaration is against the interest of the person making it has no bearing in determining the question. If they are fairly detached from the original transaction so as not to be the spontaneous product of it, they are no part of the *res gestæ*.

It is not possible to give a general rule applicable to all cases. The question of the admissibility of such evidence must necessarily depend upon the peculiar facts and circumstances of each case, and rests largely in the discretion of the court. Indeed, there is no one branch of the law of evidence that calls for the exercise of a keener discretion, or more sound judgment than this. To group the declarations, acts and circumstances attendant upon the principal transaction and determine whether they are natural or artificial, *mala fide* or *bona fide*, is a matter calling into exercise the best faculties of a judicial mind. Instances can be given showing when such evidence has been received, and when it has been rejected; but they furnish no test for another case. Yet the *real* test generally applicable is simply whether the evidence sought to be admitted is of acts, declarations or circumstances so immediately connected with the fact in issue as to be a part of it, and whether they are so far the natural, voluntary, and spontaneous result of it, and are so intimately connected with it in point of time, that they may be said to spring from it, and explain the real nature, character or extent of the transaction itself. It is not essential that they should have occurred at the *precise time* of the transaction itself, but they must have occurred at such a time, and in such a manner, and

must be so closely allied thereto as really to form a part of it. *Meek v. Perry*, 36 Miss. 190; *Fifield v. Richardson*, 34 Vt. 410; *Tompkins v. Reynolds*, 17 Ala. 109; *Kearney v. Farrell*, 28 Conn. 317; *Rutland v. Hathorn*, 36 Ga. 380; *Riggs v. State*, 6 Cold. (Tenn.) 517.

Thus in an action brought by a widow for damages resulting from the killing of her husband, it was held that, he being injured and almost *instantly* killed, his declarations, as to the manner in which the accident happened, were proper evidence as a part of the *res gestæ*; but if he had lingered for such a time that the declarations could fairly have been detached from the accident itself, they would not have been admissible. *Brownell v. Pacific, etc., R. R. Co.*, 49 Mo. 239. So too it is held that, whenever it becomes material to show the degree of bodily or mental pain sustained by a person at a particular time, the declarations of such person at such time as to their condition, made in the usual way, are admissible as evidence to prove his or her real condition. Such expressions are regarded as natural evidence, and are to be submitted to the jury, with all the circumstances attendant upon their expression, to determine whether they are real or feigned, and to give them such weight as they may deem them entitled to in view of all the attendant circumstances; *Gray v. McLaughlin*, 26 Iowa, 279; *Phillips v. Kelley*, 29 Ala. 628; *Johnson v. State*, 17 id. 618; *Looper v. Bell*, 1 Head. (Tenn.) 373; and if such statements are made, after the action for damages is commenced, to a physician, to enable him to form a medical opinion as to the patient's condition, such statements are competent as a part of the *res gestæ*; but the time when they were made may detract from their weight; *Barber v. Merrian*, 11 Allen (Mass.), 322; *Towle v. Blake*, 48 N. H. 92; *Taylor v. Gr. Trunk R. R. Co.*, id. 304; so it has been held in an action against a physician for malpractice, that exclamations of pain uttered by a patient may be given in evidence as a part of the *res gestæ*, for the purpose of establishing the claim, but not in aggravation of the damages; *Hyatt v. Adams*, 16 Mich. 180; and indeed it may be stated generally that the statements of a sick or injured person as to the nature, symptoms, or extent of the disease or injury, are always admissible to show his actual condition at the *time* when they are made. They must not relate to the *past* condition of the person, but to his real condition at the time when the declarations are made; *Hunt v. People*, 3 Park. Cr. (N. Y.) 569; *People v. Williams*, id. 84; *Perkins v. Concord R. R. Co.*, 44 N. H. 223; *Stone v. Watson*, 1 Ala. Sel. Cas. 236; *Baker v. Griffin*, 10 Bosw. (N. Y. Superior Ct.) 140; *Caldwell v. Murphy*, 11 N. Y. 416; *Denton v. State*, 1 Swan (Tenn.), 297; *Kent v. Lincoln*, 32 Vt. 591; *Bacon v. Charlton*, 7 Cush. (Mass.) 581; *Lush v. McDaniel*, 13 Ired. (N. C.) 485; *Earl v. Tupper*, 45 Vt. 275; *Spatz v. Lyons*, 55 Barb. (N. Y.) 476; *Insurance Company v. Mosley*, 8 Wall. (U. S.) 387; but it is held that the declarations of a person under such circumstances as to the *manner* in which it occurred, however cotemporaneous with the act itself, are not admissible; *State v. Davidson*, 30 Vt. 377; but it seems that the *cause* of the injury may be proved by declarations of a party injured, so nearly allied, as to the time of making them, with the injury itself, that they may fairly be regarded as a part of the *res gestæ*; *Stiles v. Danville*, 42 id. 282. Thus, in *Com. v. M' Pike*, 3

Cush. (Mass.) 181, it was held that the declaration of a person who is wounded and bleeding, that she was stabbed by the defendant, is admissible after her death as a part of the *res gestæ*, even though made after she had received the injuries and had had time to go up stairs to her own room. But generally where such a length of time has elapsed as to fairly disconnect the statements with the original cause, the statements cannot be received. For instances, see *Matteson v. N. Y., etc., R. R. Co.*, 35 N. Y. 487; two days after; *State v. Dominique*, 30 Mo. 585; thirty minutes after; *Denton v. State*, 1 Swan (Tenn.), 297; *Kinnard v. Burton*, 25 Me. 39.

But a person's statements, as to his condition, are not admissible in an action to which he is not a party for the purpose of establishing the *time* when he contracted the disease. *Ashland v. Marlborough*, 99 Mass. 47.

In criminal cases, where there is evidence tending to show a privity and community of design to commit offenses of the character charged against them, great latitude is, and should be, given in allowing evidence of their acts to be shown, as well as the declarations and conduct of each or all of them, as go in furtherance of their criminal purposes and designs. *Mason v. State*, 42 Ala. 532.

It was well observed by Hosmer, C. J., in *Enos v. Tuttle*, 3 Conn. 250, that "to be a part of the *res gestæ*, the declarations must have been made at the time of the act done to which they relate, and are supposed to characterize, and must be well calculated to unfold the nature and quality of the facts they were intended to explain, and to so harmonize with them as obviously to form one transaction." As a general rule, that is as nearly perfect as can be given; but it will be seen, at a glance, that it furnishes but little aid to determine questions of this character. Necessarily, each case must stand by itself, and the court must, in view of the facts, the situation and circumstances surrounding the transaction, judge whether the acts, declarations, and circumstances sought to be admitted are so intimately connected with the principal fact as to form a part of it, and thus fairly be a part of the *res gestæ*, admissible as evidence.

The only way in which the matter can be fairly tested is in the light of what has been done by courts in cases involving similar questions; and I will give here a few illustrations selected from the cases, applicable to business transactions.

It is held that parol evidence is admissible to prove that instruments bearing different dates, as a note and receipt, or a bond and note, were delivered at the same time, and are a part of the same transaction. *Brown v. Holyoke*, 53 Me. 9.

So where the plaintiff purchased a boiler of the defendant, and the negotiation began in the morning but was adjourned until the evening, it was held that what the defendant said about the boiler in the morning was admissible to establish a warranty, and was properly a part of the *res gestæ*. *Cunningham v. Parks*, 97 Mass. 172.

Where a third person presented a bill to the defendant for the plaintiff, for payment, who refused to pay the same, it was held that it was proper for the

defendant, upon cross-examination, to show by the witness what he said about having paid the bill. *Webster v. Canman*, 40 Mo. 156.

Where the issue was whether certain property had been sold to the defendant or a third person, it was held competent for the plaintiff to show that just before the sale he had been advised not to sell the property to such third person, and that he may prove this by the person who gave him the advice. *Bronner v. Frauenthal*, 37 N. Y. 166.

Where it is sought to prove a sale of goods, and a warranty thereof, it is proper to show all that was said by the parties during the pendency of the negotiations as a part of the *res gestæ*. *Elliott v. Stoddard*, 98 Mass. 115.

Where property is sold at a public sale, declarations of bystanders are held admissible as evidence in regard to it. *Stewart v. Severance*, 43 Mo. 322.

Where a person, at the time of loaning money, declares that it is trust money, or money that belongs to a ward, it is competent to be shown by him as a part of the *res gestæ*. *Beasley v. Watson*, 41 Ala. 234.

Where a stock of goods has been attended by a sheriff as the property of A, which are claimed by B by virtue of a sale from A to him, it is competent, in a suit to test the validity of B's title thereto, for B to show, by one who was called in to take an account of the stock, a conversation at the time, between A and B, that the account of the stock was to be taken for the purpose of turning it over to B to satisfy a debt due to him from A. But in such a case it is not competent for the sheriff, or other person, who is claiming to hold the goods as A's property upon the attachment, to show the declarations and conduct of A at the time when the attachment was made, and not qualifying or explaining any material fact in the case *not* admissible. *Pullman v. Newberry's Adm'r's*, 41 Ala. 168.

So too it is held that a card signed by the passengers on a train at the time of an accident, which was not signed until two days after the accident occurred, exonerating the officers from all blame, is not admissible as a part of the *res gestæ* in a suit against the company for damages. *Macon, etc., R. R. Co. v. Johnson*, 38 Ga. 409.

So it is held that the acts and declarations of the donor and donee at the time of an alleged gift are competent to be shown as a part of the *res gestæ* to prove delivery, and a subsequent recognition by the donor of the donee's title may also be shown. *Bragg v. Massie's Adm'r*, 38 Ala. 89.

The statements of officials having the direction of public work, made during the time that the work was being prosecuted for a municipal corporation, to persons engaged upon it, are admissible as a part of the *res gestæ* to show the manner and circumstances under which the work was begun and prosecuted. *Maher v. Chicago*, 38 Ill. 266.

In an action against a railroad company for a breach of contract in the transportation of goods, the declarations of the engineer having charge of the train in which the goods were being transported, in reference to the cause of the delay, were held admissible as a part of the *res gestæ*. *Sisson v. Cleveland, etc., R. R. Co.*, 14 Mich. 489.

In an action upon a bond, given to release a barge which had been attached

to enforce a lien upon it for lumber sold to the builder by the plaintiff, it was held that the declarations of the builder to the plaintiff while transacting the business as to the person for whom he purchased it, and as to the amount required in building the barge, were admissible as part of the *res gestæ*. *Happy v. Mosher*, 47 Barb. (N. Y.) 501.

So declarations made by the husband at the time of giving his wife money, as to the purpose for which he gave it, as well as his representations as to the person for whom he was acting when he received a bill of sale for his wife, are held admissible in an action in favor of the wife as a part of the *res gestæ*. *Kells v. Campbell*, 2 Abb. App. (N. Y.) 492.

In a suit by a creditor of the husband to set aside a deed of gift made by a third person to the wife, on the ground that the property was purchased with the husband's money, and the deed a fraud, evidence of conversations between the grantor and the person who negotiated the sale for the wife at the time of the sale, were held properly admissible as a part of the *res gestæ*. *Tevis v. Hicks*, 41 Cal. 123.

In an action against one for false representations in the sale of property, it was held competent for him to show that similar representations were made to him by credible persons previous thereto, the evidence having a tendency to acquit him of bad faith in making the representations. *Beach v. Bemis*, 107 Mass. 498.

What is said by a person at the time of an accident caused by him, which has a tendency to prove that the accident was caused by his carelessness, is admissible to establish his negligence, as a part of the *res gestæ*. *Courtney v. Baker*, 34 N. Y. Sup. Ct. 529.

It is held that, where a person's personal habits may furnish a key to the act in question, they may be shown. Thus, when a note was claimed to have been given to the plaintiff on Sunday, it was held competent for him to show that he was the superintendent of a Sabbath school, which he invariably attended. *Blackwell v. Hamilton*, 47 Ala. 470.

Declarations of the testator, at the time when a will is executed, are proper and competent evidence upon the question of capacity. *Bates v. Battis*, 27 Iowa, 110; 1 Am. Rep. 260.

So it is held that the declarations of a principal to a note, as to the relations thereto of other parties whose names are thereon, made to the plaintiff at the time of obtaining his signature thereto, are admissible as a part of the *res gestæ*. *Whitehouse v. Hanson*, 42 N. H. 9. So, where a married woman has signed and acknowledged a deed of lands, jointly with her husband, in proceedings instituted by her to set aside the deed on the ground of fraud or duress, she may show the state of her mind and health at the time of her acknowledgment, and that her husband had preceded this by threats and menaces, which had put her in terror, and induced the act against her will. *Central Bank v. Copeland*, 18 Md. 305. So it is held that the declarations of a grantor, at the time of the execution of a deed for the benefit of his creditors, are properly admissible as a part of the *res gestæ* in a suit brought to set aside the conveyance on the ground of fraud. *Potter v. McDowell*, 31 Mo. 62; Gil-

lett v. Phelps, 12 Wis. 392. So declarations of a grantor of real estate, made at the time when the conveyance is executed, are admissible to show the intention of the grantor in making the conveyance; Kent v. Harcourt, 33 Barb. (N. Y.) 491; Badger v. Story, 16 N. H. 168; Gamble v. Johnson, 9 Md. 605; but declarations or admissions made by a grantor *after* the conveyance is executed are not admissible Myers v. Kinzie, 26 Ill. 36.

In an action against a physician or surgeon for malpractice, their statements made in the presence of the plaintiff during his treatment, or at the time when the plaintiff is discharged from further treatment, are always admissible as a part of the *res gestæ*. Piles v. Hughes, 10 Iowa, 579.

Where a person is sued for an assault and battery, when the evidence tends to show that the defendant was assaulted by the plaintiff and others upon the occasion when the injury sued for was inflicted, the declarations of any of the persons engaged in the assault upon him, as to their intention and purpose, are held admissible as a part of the transaction. People v. Roach, 17 Cal. 297.

Where personal property is sold and left in the possession of the vendor, as agent of the vendee, in an action to test the validity of the sale it is held that the declarations of the vendor and vendee at the time of the sale are admissible. Clark v. Rush, 19 Cal. 393.

Where it becomes material to show whether a deed was delivered as an escrow, the acts and declarations of a party, preceding the execution of the deed by him, may be shown. Cheswell v. Eastham, 16 N. H. 296; Badger v. Story, *id.* 168.

Declarations made by a husband, at the time when money belonging to his wife comes into his possession, are, if evincive of his purpose and intention, admissible as evidence, when material, upon the question as to whether such money was received in trust for his wife, or whether he intended to reduce it to his own possession. Johnson v. Johnson's Ex'rs, 7 Casey (Penn.), 450; Gicker's Adm'r v. Martin, 14 Wright (Penn.), 138; Moyer's Appeal, No. 44, Weekly Notes of Cases (Penn.), 527. So the declarations of a party, at the time of paying money to a creditor, are admissible for the purpose of showing what application was to be made of it; Bank of Woodstock v. Clark, 25 Vt. 308; the declarations of the vendor of goods made at the time of the sale are a part of the *res gestæ* for the purpose of establishing the sale and its purpose; Dale v. Gower, 24 Me. 563; and in fact, every thing that takes place between the parties to a verbal contract before its completion; Pierson v. Hoag, 47 Barb. (N. Y.) 243; and it may be stated, generally, that whenever it becomes material to ascertain the nature of a particular act, and the intention of the person who did it, what he said and did at the time of doing it is always admissible as a part of the transaction itself; Curtis v. Moore, 20 Md. 93; as to ascertain the malady, or the true nature of its effects and symptoms, of a sick or injured person, whether made to a physician or others, but such declarations are entitled to more weight when made to a physician during his treatment of the patient; Stone v. Watson, 1 Ala. 236; Perkins v. Concord R. R. Co., 44 N. H. 223; so the declarations of the owner of lands claimed to

have been dedicated to the public, both before and after their use by the public, to show his intention. *Buchanan v. Curtiss*, 25 Wis. 991 ; 3 Am. Rep. 23.

So instructions given by a principal to his agent in reference to the delivery of a message to, or the making of a demand of another, when the message is delivered or the demand made. *Featherman v. Miller*, 45 Penn. St. 96. What is said by the parties to a sale in reference to it during the pendency of negotiations. *Atherton v. Tilton*, 44 N. H. 452.

What is said by a person when paying money to another, as to the application of it, or as to whose money he is paying. *Carter v. Beals*, 44 N. H. 408.

To show whether goods were sold by one as his own, or as the agent of another, his declarations at the time of the sale are admissible. *Milne v. Leisler*, 7 H. & N. 786.

To show what title one claims to property in his possession, his declarations relative thereto while he has the property in his possession are admissible. *Patterson v. Flanagan*, 1 Ala. (S. C.) 427.

So where one sues for injuries done to his property by another, while the property was in the possession of a servant, the declarations of the servant at the time of the injury as to the cause thereof are admissible. *Toledo R. R. Co. v. Goddard*, 25 Ind. 185.

So it has been held that the exclamations of passengers on a railway train at the time of the happening of an accident ; *Galena R. R. Co. v. Fay*, 16 Ill. 558 ; the declarations of bystanders at a public sale ; *Stewart v. Severance*, 43 Mo. 322 ; the acts and sayings of a constable at the time of making a levy ; *Arnold v. Gorr*, 1 Rawle (Penn.), 223 ; *Dobb v. Justice*, 17 Ga. 624 ; *Grandey v. McPherson*, 7 Jones (N. C.), 347 ; of a public surveyor when running a line to establish the character or purpose of the survey ; *George v. Thomas*, 16 Tex. 74 ; what is said by a claimant to the sheriff at the time of a levy ; *Morgan v. Simms*, 26 Ga. 288 ; what is said by a person while engaged in carrying away property claimed by another ; *Drumwright v. State*, 29 id. 430 ; what is said by the plaintiff in a writ of attachment, as to his reasons for having it issued, made at the time of its issue ; *Wood v. Banker*, 37 Ala. 60 ; negotiations between parties are admissible to show to whom credit was given, and to explain the transaction ; *Eastman v. Bennett*, 6 Wis. 232 ; instructions given by one of the parties to an assistant ; *Wilson v. Smith*, 28 Ill. 495 ; what is said by a person when money is paid to him, to show whether it was received in full or not, as well as to show upon what debt it was to be applied ; *Dillard v. Scruggs*, 36 Ala. 670 ; statements made by a person at the time when a demand is made upon him for property, or for any purpose ; *Lamphy v. Scott*, 24 Miss. 528 ; the declarations of a servant at the time of leaving his master ; *Hadley v. Carter*, 8 N. H. 40 ; the declarations of a person engaged upon work, to show who he was working for and the nature of the contract ; *Printup v. Mitchell*, 17 Ga. 558 ; the declarations of a person on leaving home as to where he was going and the nature of his business ; *State v. Howard*, 32 Vt. 380 ; *Autauqua Co. v. Davis*, 32 Ala. 713 ; declarations of the principal to a note, as to the relation of those whose names are already upon it, made to one whose signature he obtains thereto ; *Whitehouse v. Hanson*, 42 N. H. 9 ; declarations of

one in the possession of property, made at the time when the property was delivered to him, to show the nature and purpose of his possession, *State v. Scheider*, 35 Mo. 533; *Johnson v. Boyles*, 26 Ala. 576, have been held admissible as a part of the *res gestæ*; as the declarations of the vendor before the sale as to the character or quality of the goods; *Land v. Lee*, 2 Rich. (S. C.) 168; or of one in the possession of land, as to the extent of his claim, and the character of his occupancy; *Sailor v. Hertzogg*, 2 Barr. (Penn.) 183; or his intention in doing a certain act, as that, by clearing land and burning charcoal thereon, he intended to settle and improve the lands. *Jones v. Brownfield*, id. 55.

So it has been held that the declarations of a person having personal property in his possession, made before any claim is made to the property by another, may be given in evidence in an action between him and a person claiming the property, but that the weight to be given to such evidence is for the jury. *Gerry v. Terrill*, 9 Ala. 206; *Horton v. Smith*, 8 id. 73; *Trotter v. Watson*, 6 Humph. (Tenn.) 509.

Thus it will be seen that, whenever the acts or declarations of a party, made at the time of a transaction, and so intimately connected therewith as to form a part of it, which tend to explain the transaction, or to aid in arriving at the real nature, character, and purpose of the transaction, are admissible in evidence as well for as against the party making them; and such evidence is admissible not only in actions between the parties themselves, but also in actions for or against their personal representatives, or those who are privy in interest with the parties. *Greenleaf on Evidence*, § 189.

The justice of the rule, permitting all the acts and declarations of a party immediately connected with it, and material thereto, to be given in evidence to show the real intention, object and purpose of parties to a contract, when any reasonable doubt exists from the language of the contract itself, as well as the acts and declarations of parties to *any* transaction, to show the real nature and character of the transaction or act, is unquestionable. The real intention of a person in a transaction, which is not reduced to writing, can be gathered in no other way. Men act from secret motives, and their *declared* intention is very often quite at variance with the *real* motive which actuates them. Therefore, the only real key thereto is their acts, and any acts calculated to throw light upon that point, and intimately connected with it, are always admissible. Thus, it has been held that, when fraud in the purchase or sale of property is in issue, it is competent to show other similar frauds committed by the *same* parties, at or near the same time, as tending to establish the *animus* of the parties in the transaction in question, and to show their fraudulent intent — as, in a proceeding for the forfeiture of a distillery for fraudulent distillation, it has been held competent to show the fact that, by the decree of another court, liquors from the same distillery had been forfeited; *United States v. One Distillery*, 2 Bond (U. S.), 399; *Butler v. Watkins*, 13 Wall. (U. S.) 456; so, it has been held competent to show in a proceeding for a forfeiture under the internal revenue law, that the defendants have been guilty of other similar frauds, in order to establish their fraudulent intent; *United States v. Merriam*,

3 Chicago Legal News, 114 ; United States v. Thirty-six Barrels of High Wines, 7 Blatch. (U. S.) 469 ; United States v. Four Cases Merinoes, 2 Paine (U. S.), 200 ; so in an action against a commission merchant for fraudulently selling the goods of a customer to an insolvent purchaser, evidence of similar fraudulent acts at about the same time have been held competent upon the question of intent; Carth v. Bullard, 23 How. (U. S.) 172 ; and in proceedings for forfeiture, under the customs law, by means of false invoices, or undervaluation of goods, it is held that evidence of previous similar transactions, both before and after the transaction in question, may be shown; Taylor v. U. S., 3 How. (U. S.) 197 ; Wood v. N. Y. 16 Pet. (U. S.) 342 ; Buckley v. U. S., 4 How. (U. S.) 251 ; Alfonso v. U. S., 2 Story (U. S.), 421. In Rex v. Davis, 6 C. & P. 177, it was held that, in a prosecution for receiving stolen goods, it was competent to show that the respondents, who were pawnbrokers, had received other stolen goods from the *same person* with a view to establishing the *scienter*. But, while the rule as applied to this case, and generally as restricted in that case to transactions between the *same parties*, may not be obnoxious to criticism, yet the case itself, and the consideration given the question by Gurney, J., on the trial, does not entitle it to great weight as an authority. The same rule, however, was adopted in Rex v. Dunn & Smith, 1 M. C. C. 146. In Coleman v. The People, 55 N. Y. 81, it was held that evidence that the respondent had received other stolen property from *other* persons was not admissible to establish the *scienter* ; and in People v. Corbin, 56 N. Y. 363 ; 15 Am. Rep. 427, it was held that evidence of *other forgeries* by the respondent was not admissible in a prosecution against him for forging the name of *another* person. It was well said by Rapallo, J., in the case referred to, that "the fact that the prisoner made an unauthorized use of the name of one person, if established, shows that he was morally capable of committing the same offense against another, *but does not legitimately tend to show that he did so.*" Thus, it will be seen that, while, in order to show a person's intent in a particular matter, transactions between the *same parties* of a *similar character* may be shown, similar transactions between *other* persons, to which one of the parties was a party, are *never* admissible ; Jones v. Knowles, *ante*. In State v. Howard, 32 Vt. 380, the respondent was arrested for procuring an abortion, and the fact of the death having been proved to have occurred at his house, and other circumstances tending to establish the crime, it was held that the declarations of the deceased at the time she left home, as to her purpose in going to the respondent's house, were admissible as a part of the *res gestæ*.

The *general* rule excludes all parol evidence in reference to written contracts, which tends to alter, vary or control their terms ; and this extends even to the exclusion of what was said or done by the parties thereto before, at the time of, or just after, the making of the contract. The entire agreement of the parties — in the absence of fraud or mistake — is regarded as being merged in the writing itself ; and when there is no *latent* ambiguity therein, the writing must speak for itself, and be construed without resort to extrinsic evidence. But, when the meaning and intent of the parties to the instrument cannot be reasonably gathered from its language, as where words are used, the ordinary

meaning of which, applied to the contract, would be senseless; or where the instrument is susceptible of a double construction essentially different from each other, as well as in numerous other instances, parol evidence of what was said or done by the parties at the time of the making of the contract, the existence of a local custom or a usage of a trade in reference to which the contract was made; or by which certain ordinary words are given a special and peculiar meaning; or a condition of things in the locality where the contract was made, in reference to which the contract was made, may be given in evidence really as a part of the *res gestæ*, not to alter or vary the contract itself, but to explain it, and ascertain the real intention and purpose of the parties thereto. Thus, where the meaning and application of a written contract cannot be ascertained from the *instrument itself*, parol evidence may be given to explain its true intent and meaning. *DeWolf v. Crandall*, 1 Sweeney (N. Y.), 556; *Suffern v. Butler*, 21 N. J. 410; *Sweet v. Shumway*, 102 Mass. 365; *Iron City Commercial College v. Kerr*, 3 Brewst. (Penn.) 196; *Howlett v. Howlett*, 56 Barb. (N. Y.) 467; *Arthur v. Roberts*, 60 id. 580; *Robinson v. United States*, 13 Wall. (U. S.) 363; *Harris v. Rathbun*, 2 Abb. App. (N. Y.) 426; and this, whether the ambiguity arises from the contract itself, or the mode of executing it; *Haile v. Pierce*, 32 Md. 327; *Richmond R. R. Co. v. Snead*, 19 Gratt. (Va.) 354; and facts existing at the time of making the contract, to which the words employed in it relate, may be proved as a solution of the real intent, purpose and meaning of the parties; *Richards v. Schlagelmick*, 65 N. C. 150; *Donley v. Tindall*, 32 Tex. 43; as that a contract for the payment of money was made with reference to confederate money; *Thornington v. Smith*, 8 Wall. (U. S.) 12; *Donley v. Tindall*, *ante*; or a custom, in reference to which the contract was made and by which a peculiar meaning is given to certain terms or phrases used therein; *Carey v. Bright*, 58 Penn. St. 70; *Hurlbert v. Carver*, 37 N. Y. 62; *Harb v. Hammett*, 18 Vt. 127; *Collyer v. Collins*, 17 Abb. Pr. (N. Y.) 467; *Williams v. Wood*, 16 Md. 220; *Drake v. Goree*, 22 Ala. 409; *Fitch v. Carpenter*, 43 Barb. (N. Y.) 40; *Willmering v. McGaughey*, 30 Iowa, 205; *Wells v. Bailey*, 49 N. Y. 464; but such custom is never admissible to vary a well-established rule of law; *Boon v. Belfast*, 40 Ala. 184; *Shaw v. Spencer*, 100 Mass. 382; or when opposed to the clear provisions of the contract; *Lombardo v. Case*, 45 Barb. (N. Y.) 45. The circumstances attending the transaction, and what was said and done by the parties while engaged in the act of execution, may be resorted to, not to vary, but to explain and apply the contract; *Foster v. McGraw*, 64 Penn. St. 464; *Field v. Munson*, 47 N. Y. 221; *Ins. Co. v. Thorp*, 22 Mich. 146; *Goodrich v. Stevens*, 5 Lans. (N. Y.) 230; *Bambridge v. Wade*, 20 L. J. (Q. B.) 7; *Grant v. Lathrop*, 23 N. H. 67; *Knights v. N. E. Worsted Co.*, 2 Cush. (Mass.) 271; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *Conner v. Carpenter*, 28 Vt. 237; *Emery v. Webster*, 42 Me. 204; *Ratcliff v. Allison*, 3 Rand. (Va.) 537; *Carmony v. Hooper*, 5 Penn. St. 305; *Black v. Columbian Ins. Co.*, 42 N. Y. 393; *McGuire v. Stevens*, 42 Miss. 724; *Acker v. Bender*, 33 Ala. 230; *Sigerson v. Cushing*, 14 Wis. 527; *Cross v. Pearson*, 17 Ind. 612; *Halstead v. Meeker*, 15 N. J. 136; *Haldeman v. Chambers*, 19 Texas, 1; and show the real intention of the parties; *Venzan v. McGregor*,

23 Cal. 339; Ohio, etc., *R. R. Co. v. Middleton*, 20 Ill. 629; *Hinnemann v. Rosenback*, 39 N. Y. 98; *Farmers' Bank v. Winfield*, 24 Wend. (N. Y.) 419; *Lowrey v. Adams*, 22 Vt. 160; *Donnell v. Simonton*, 13 Minn. 301; but a party cannot, even when there is an ambiguity, be allowed, in the absence of fraud, to swear to what his *understanding* of the matter was, unless the other party understood the matter the *same way*. *Dalano v. Gorham*, 48 N. H. 203.

So it is always competent to show that the contract was made in furtherance of an illegal object, or is void for the reason that it never had any legal existence; *Leppoc v. Nat'l Union Bank*, 32 Md. 136; *Martin v. Clarke*, 8 R. I. 389; or where it is silent as to the time or mode of payment, parol evidence may be given to establish the understanding or agreement of the parties in that respect; and the same is true when any essential feature or part of the contract has obviously been omitted; *Paul v. Owings*, 32 Md. 402; *Donley v. Tindall*, 32 Tex. 43; as where a person has sold the good-will of a business, in what place his business was located; *Warfield v. Booth*, 33 Md. 63; or to show the *actual* or an additional consideration of a contract or deed, when the terms of the bargain are not specifically stated; *Pierce v. Brew*, 43 Vt. 292; *Nedvidek v. Meyer*, 46 Mo. 600; *Landeman v. Ingraham*, 49 id. 212; *Perry v. Smith*, 34 Tex. 277; *Booth v. Hines*, 54 Ill. 363; or to identify property described in it, whether real or personal; *Hutton v. Arnett*, 51 Ill. 198; *Bancroft v. Grover*, 23 Wis. 463; or that a sale mentioned in a written agreement was made by sample, and whether or not the articles tendered correspond therewith; *Pike v. Fay*, 101 Mass. 134; *Stoops v. Smith*, 100 id. 63; *Sweet v. Shumway*, 102 id. 365; or the purpose for which a note was given, when not inconsistent with its terms; *Collins v. Gilson*, 29 Iowa, 61; *Kimball v. Myers*, 21 Mich. 276; *Hutchins v. Hubbard*, 34 N. Y. 24; or for whose benefit a contract was made; *Lancey v. Phenix, etc., Ins. Co.*, 56 Me. 562; *Washington Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; or that it was executed upon condition that some other person should sign it; *Robertson v. Evans*, 3 S. C. 330; *Butler v. Smith*, 35 Miss. 457; or when fraud is claimed, or any breach of warranty in an action upon an insurance policy, upon the ground that the building was used for purposes more hazardous than those in the class in which it was rated, proof is admissible to show that the insurers knew the structure and the uses to which it was devoted; *Mayor, etc., of N. Y. v. Exchange Ins. Co.*, 3 Abb. App. (N. Y.) 261; or when only a part of the agreement has been reduced to writing and it rests partly in parol; *Webster v. Hodgkins*, 25 N. H. 128; *Barker v. Bradley*, 42 N. Y. 316; *Winn v. Chamberlain*, 32 Vt. 318; *Crane v. Elizabeth, etc., Assoc.*, 29 N. J. 302; so any distinct valid parol contract between the parties, made at the same time and not reduced to writing, which is not in conflict with the terms of the written contract, and which operated as an inducement to either of the parties to enter into the original agreement; *Bonney v. Merrill*, 57 Me. 368; but this must not be understood as authorizing the proof of any parol agreement so made, to in any wise vary, enlarge or control the terms or provisions of the written contract; *Vandercar v. Thompson*, 19 Mich. 82; *Proctor v. Gilson*, 49 N. H. 62; *Buzzell v. Willard*, 44 Vt. 44; *Basshor v. Forbes*, 36 Md. 155; *Weaver v. Fulsher*, 27 Ark. 510; *Smith v. Dallas*, 35 Ind. 255; so a contract may be

shown to have been made at a different date from that which it bears; *Finney's Appeal*, 59 Penn. St. 398; *Perry v. Smith*, 34 Tex. 277; or that the grantee in a deed agreed to hold the land in trust. *Buzzell v. Willard*, 44 Vt. 44; *Morrall v. Waterson*, 7 Kan. 199.

The application, force and extent of this exception to the rule is well illustrated by a case recently decided in the Supreme Court of Pennsylvania, *Shugart v. Moore*, 1 Weekly Notes of Cases, 598, 599, under the following state of facts: The plaintiff went into possession of the defendant's farm under a written lease, by the terms of which he was to cultivate the farm upon shares. There was no barn upon the premises suitable to store the crops in, and there was no provision in the lease in reference to the building of a new one; but the plaintiff offered to prove upon the trial, that before the 1st of April, 1869, the defendant proposed that if he (the plaintiff) would lease and move on to his (the defendant's) farm for a year, as a *cropper*, he (the defendant) would build a barn thereon by harvest time; that when the defendant brought the agreement to him to sign, he at first refused to sign it, because it did not mention that the defendant was to build the barn; that the defendant then said that that was not necessary as he was a man of his word and would do as he had agreed, whereupon the plaintiff signed the agreement and entered into the possession of the farm; but the defendant neglected and refused to build the barn. Upon the trial of the case in the lower court the judge refused to admit the evidence of the foregoing facts, but the Supreme Court held that the evidence was admissible. *Sharswood, J.*, said: "The cases of *Weaver v. Wood*, 9 Barr. (Penn.) 220, and *Powelton Coal Co. v. McShain*, 74 Penn. St. 238, are full, to the point that the evidence should have been admitted. These cases settle, beyond all question, that when a promise is made by one party, in consideration of the execution of a written instrument by the other, it may be shown by parol evidence."

The same doctrine was applied in the case of *Lindley v. Lacey*, 17 C. B. (N. S.) 578. In that case it was held, that where, in negotiating the sale of the good-will and fixtures of a business, the purchaser promised that, in consideration of the vendor's signing the agreement, he would settle a suit of a third party pending against the vendor, that parol evidence of such agreement was admissible, *even though the written agreement authorized the purchaser to settle the suit out of the purchase-money.*

In *Baker v. Mich. Cent. R. R. Co.*, 42 Ill. 73, the plaintiff shipped eighty tierces of hams over the defendants' road, in reference to the shipment and transportation of which he made an oral agreement with the defendants, through their agent, that the freight should not be subject to the restrictions upon the carriers' liability applied to less perishable goods. The bill of lading contained this restriction, but the court held that the agreement between the parties might be shown by parol evidence in rebuttal of the bill of lading in that respect.

In *Silliman v. Tuttle*, 45 Barb. (N. Y.) 171, the plaintiffs bought of the defendants a canal boat. The price was agreed upon, and a bill of sale executed and delivered. The boat was then on a trip transporting merchandise,

and it was agreed, by parol, between the parties at the time of the sale, that the plaintiffs should have the avails of the trip, upon payment of the expenses thereof. The bill of sale was silent upon this matter, and the title and right of possession passed on delivery of the bill. It was held by the court that this was an independent contract, relating to the earnings of the boat, and not to the boat itself, and having no necessary connection with its sale, and that parol evidence was admissible to establish it, and that its establishment did not, in anywise, interfere with, alter, vary or control the bill of sale.

So evidence is admissible when it only tends to establish a contract supplemental to the written contract. Thus, in *Malpas v. London, etc., R. R. Co., L. R., 1 C. P. 336*, the plaintiff made arrangements orally with the defendants to convey cattle for him to E. on their railway, and thence to K. on a connecting line, and at the same time, without noticing its contents, signed a consignment note by which the cattle were directed to be shipped to E. It was held that evidence was admissible to prove the parol agreement to transport the cattle from E. to K., as such agreement did not conflict with the consignment note, but was merely *supplemental* thereto.

That collateral parol agreements relating to the subject-matter of the contract, but entirely independent of the contract itself, and not intended to qualify or control it, may be given in evidence, and may be made the ground of an action, or, in a proper case, set up as a defense to the instrument itself, is established by numerous authorities. *Buzzell v. Willard*, 44 Vt. 44; *Morrill v. Waterson*, 7 Kan. 199; *Wesbrook v. Jeffers*, 33 Tex. 86.

But the contract must be an independent one, and such as could properly be made by parol, and as is not repugnant to the provisions of the written agreement; that is to say, it must not be such a contract as in anywise qualifies, limits or controls the written instrument itself, or its effect, application or construction. Thus it has been held incompetent to introduce evidence of a parol agreement, that the deed of a certain piece of land should pass the manure then on the premises, because such an agreement would qualify or extend the provisions of the instrument, and add to its effect, and control its legal construction; because the question as to whether the manure passed by the deed is purely one of law, depending upon a variety of questions. *Proctor v. Gilson*, 49 N. H. 62.

But, *quere?* if the manure was not a part of the realty, and would not pass under the granting clause of the deed, would it not be competent for the grantee to show, in defense of an action brought against him by the grantor for its conversion, not that it was agreed that the deed should pass the manure, but that it was agreed by the grantor, as an *inducement to the purchase of the land*, that the grantee might have the manure? And would not such an agreement, when the manure is clearly personal property rather than a part of the realty, be such an independent collateral agreement as would be obligatory upon both parties? Such an agreement could not, in any sense, be said to be repugnant to the deed. See *Westbrook v. Jeffers*, 33 Tex. 86; *Ruggles v. Swanwick*, 6 Minn. 526; *Joannes v. Madge*, 6 Allen (Mass.), 245; *Mobile Marine Dock, etc., Co. v. McMillan*, 31 Ala. 711; *Keough v. McKnitt*, 6 Minn. 513;

nature, or indicates any better source from which it derives its weight.(a)

Randall v. Turner, 17 Ohio St. 262; Johnson v. McRary, 5 Jones (N. C.), 369; Page v. Sheffield, 2 Curt. (U. S.) 377; Phillips v. Preston, 5 How. (U. S.) 278; Pomeroy v. Marine, 2 Paine (U. S.), 476. See especially Hurbald v. Kuster, 44 Penn. St. 392, where it was held that a reservation of the crops on the sale of a farm might be enforced, even though the deed contained no mention of such reservation. "For," say the court, "though the agreement for the sale of the land was merged in the deed, consummating the sale, it was not merged in regard to that which was not to be consummated by deed, *and which was of a different nature and collateral to it.*" See, also, Merrill v. Blodgett, 34 Vt. 480; Pierce v. Woodard, 6 Pick. (Mass.) 206; Hersey v. Virell, 39 Me. 271; Flint v. Conrad, Phill. (N. C.) 190; Buckentoss v. Stahler, 33 Penn. St. 251; Manning v. Jones, Bunb. (N. C.) 368.

All patent ambiguities are to be construed by the court, and parol evidence is not admissible to explain or aid the construction. Cockburn v. Alexander, 13 Jurist, 18; Hitchins v. Groom, 5 C. B. 515; Smith v. Thompson, 18 L. J. C. P. 314. But where an expression in a document produced in evidence becomes ambiguous by reason of *extrinsic* evidence, it is the province of the jury to construe the ambiguity. Smith v. Thompson, *ante*; Kinglake v. Beviss, 18 L. J. C. P. 628; Lockett v. Nuklin, 19 L. J. Exch. 403; Edwards v. Jevons, 14 Jur. 131; Adams v. Peters, 2 C. & K. 723.

(a) In order to bring proof of the knowledge of a fact home to a party, it has been held that evidence of a general belief in the existence of the fact is admissible; Benoist v. Darby, 12 Mo. 196; so, too, it has been held that proof of the general notoriety of a person's character is competent evidence to prove that a person residing in the neighborhood had knowledge of that character; Stittings v. State, 33 Ala. 425; so general reputation, where the witness has a personal acquaintance with the person, has been held admissible upon the question of a person's solvency, as well as his habits for industry, sobriety, etc., with a view to establishing the knowledge of a part of such facts; Hard v. Brown, 18 Vt. 87; see also, to the same effect, Ward v. Herndon, 5 Port. (Ala.) 382; so it has been held that proof is admissible that a person was generally reputed to be a negro trader; Taylor v. Horsey, 5 Harr. (Del.) 131; so, too, proof that it was generally known in the town where a warehouse was located that the warehouse, containing cotton belonging to a person living twenty or twenty-five miles away, was burned and the cotton destroyed, when the person traded in the town where the warehouse was located, for the purpose of showing his knowledge of the destruction of the cotton two months afterward, when he executed his note for an advance on the cotton; Jones v. Hatchett, 14 Ala. 743; so it has been held that the incorporation of a town, parish or city may be shown by general reputation, if it is shown that no better evidence can be found; Dillingham v. Snow, 5 Mass. 552; so the death of a person, out of the State, may be proved by general reputation among his relatives; Ewing v.

Exceptions to the rule excluding derivative or second-hand evidence — Evidence of deceased witness on former trial between the same parties.

§ 496. There are several exceptions to the rule excluding second-hand evidence; and it will be found, on examination, that in almost, if not in all the cases where the rule has been relaxed, the derivative evidence received is guarded by some security which renders it more trustworthy than derivative evidence in general. First, then, on a second trial of a cause between the same parties, the evidence of a witness examined at the former trial, and since deceased, is receivable; and may be proved by the testimony of a person who heard it, or by notes made at the time.¹(a) Here the evidence was originally deliv-

¹ 1 Phill. Ev. 306, 10th Ed.

Savory, 3 Bibb (Ky.), 236; so to prove the nationality of one's ancestors; Jenkins v. Tom, 1 Wash. (U. S.) 123; so to prove boundaries, the testimony of aged witnesses is admissible, and such evidence has been permitted to establish lines against the calls of an ancient patent; Conn. et al. v. Penn. et al., 1 Pet. (U. S.) 496; McCland v. Mynott, 2 Cold. (Tenn.) 163; Bower v. Earl, 18 Mich. 367. Tradition, reputation, and hearsay are competent to establish old lines, boundaries, the location of buildings, etc.; St. Louis Public Schools v. Risley, 40 Mo. 356; so the state of the markets may be proved by the reports thereof in newspapers. Sisson v. Cleveland, etc., R. R. Co., 14 Mich. 489.

(a) Where a witness who has testified in a former trial, between the same parties or their privies, in reference to the subject-matter involved, and dies, his evidence, in such former action, if given before a court of competent jurisdiction, and was regularly and judicially taken, may be used in a subsequent suit to contest the same right, even though such evidence was not reduced to writing; State v. Hooker, 17 Vt. 658; Bowie v. O'Neal, 5 Harr. & J. (Md.) 226; Jackson v. Lamson, 15 Johns. (N. Y.) 539; Powell v. Waters, 17 id. 176; Wilber v. Selden, 6 Cow. (N. Y.) 162; Weeks v. Lowerre, 8 Barb. (N. Y.) 530; Matthewson v. Sargent, 36 Vt. 142; Osborn v. Bell, 5 Den. (N. Y.) 70; Matthews v. Colburn, 1 Strobb. (S. C.) 258; Lane v. Brainard, 30 Conn. 565; Harper v. Burrow, 6 Ired. (N. C.) 30; Jaccord v. Anderson, 37 Mo. 91; Jones v. Wood, 16 Penn. St. 25; Packard v. McCoy, 1 Iowa, 530; but it must be proved that he is dead; the mere fact that he is absent from the State and cannot be found is

ered under responsibility, and the party against whom it is offered had on a former occasion the *opportunity for cross-examination; still the benefit [* 630]

not sufficient. The actual *death* of the witness must be proved. *People v. Newman*, 5 Hill (N. Y.), 295; *State v. Staples*, 47 N. H. 113; *Wilber v. Selden, ante*; *Crary v. Sprague*, 12 Wend. (N. Y.) 41; *Dobson v. Harper*, 2 Blackf. (Ind.) 309; *Powell v. Waters, ante*; *Bergen v. People*, 17 Ill. 426; *Dupree v. State*, 33 Ala. 380; *Bragg v. Com.*, 10 Gratt. (Va.) 722.

The testimony may be proved by the production of minutes thereof taken by some person on the trial who *took* them, and is able to *swear* that they contain the *substance* or the *whole* of the evidence given by the witness, touching the issue, even though he is not able to swear that it contains the exact language used by the witness, or every word spoken by him; or it may be proved by persons present at the trial who are able to give the substance of the testimony, although the testimony of one who took minutes of the evidence is entitled to more weight than one who relies upon his recollection simply; *Williams v. Willard*, 23 Vt. 369; *Clark v. Vorce*, 15 Wend. (N. Y.) 193; *Crawford v. Loper*, 25 Barb. (N. Y.) 449; *Huff v. Bennett*, 6 N. Y. 337; *Emery v. Fowler*, 39 Me. 326; *Trammell v. Hemphill*, 27 Ga. 525; *Young v. Dearborn*, 22 N. H. 372; *Marsh v. Jones*, 21 Vt. 378; *Wolf v. Wyeth*, 11 S. & R. 149; *Sloan v. Summers*, 20 N. J. 66; *Rhine v. Robinson*, 27 Penn. St. 30; *Jones v. Ward*, 3 Jones (N. C.), 24; but in some cases it has been held that the *exact* words of the witness must be given, and that the *substance* is not sufficient; *Bliss v. Long*, *Wright* (Ohio), 351; *Com. v. Richards*, 18 Pick. (Mass.) 434; *United States v. Wood*, 3 Wash. (U. S.) 440; but the practice and rule is generally otherwise, as will be seen by reference to the cases cited *ante*.

The same rule applies to the testimony of an *absent* witness, if he is *non-resident*, in those States where such evidence is admitted. *Clinton v. Estes*, 20 Ark. 216; *Wright v. Cumpsty*, 41 Penn. St. 102; *Wilder v. St. Paul*, 12 Minn. 192; *Dye v. Com.*, 3 Bush (Ky.), 3.

Questions are sometimes raised as to the admissibility of the evidence of deceased persons given between the *same* parties and in reference to the *same* issue when the testimony was taken before arbitrators, justices of the peace, or committing magistrates, etc. So far as evidence given before arbitrators is concerned, they can hardly be styled a court of competent jurisdiction; yet, as such evidence is permissive merely, *Walker v. Walker*, 14 Ga. 242, it would hardly be error for a court to admit it; yet there are decisions both ways. In *Jessup v. Cook*, 6 N. J. 434, it was held *not* admissible, while in *Bailey v. Woods*, 17 N. H. 365, and *McAdams v. Stillwell*, 13 Penn. St. 90, it was held admissible; so as to what was sworn before a committing magistrate in *State v. Hooker*, 17 Vt. 658, and in *Davis v. State*, 17 Ala. 354, it was held admissible; in *Oliver v. State*, 6 Miss. 14, and *State v. Campbell*, 1 Rich. (S. C.) 124, it was held *not* admissible. In *Bladen v. Cockey*, 1 Harr. & M. (Md.) 230, the evidence given by a witness before commissioners appointed by statute to settle dis-

of the demeanor of the witness in giving it is lost. So by the 11 & 12 Vict. c. 42, s. 17, where a witness who has been examined before a justice of the peace, against a person charged with an offense, dies before the trial of the accused, or is so ill as to be unable to travel, his deposition, reduced to writing and signed by the justice, may be received in evidence.¹

Matters of public and general interest — Must be “ante litem motam.”

§ 497. 2. The next exception is in the proof of matters of public and general interest; such as the boundaries of counties or parishes, rights of common, claims of highway, &c.² We have seen that in proof of historical facts — of what has taken place in by-gone ages — derivative evidence must not only from necessity be resorted to, but that it is disarmed of much of its danger from the permanent effects which are visible to confirm or contradict it, the number of sources whence it may

¹ Bk. 1, pt. 1, § 105.

² See as to this, very fully, *Reg. v. Inhabitants of Bedfordshire*, 4 E. & B. 535, 542. See, also, 1 Phill. Ev. ch. 8, sect. 3, 10th Ed.; Tayl. Ev. Part 2, ch. 8, 4th Ed. See Mascard. de Prob. Concl. 287, 395–403.

puted boundaries was held admissible; and it may be stated as the general rule, that, *if the evidence was given before any tribunal having power to act concerning the issues involved, and to decide upon them*, the evidence given before them, by witnesses deceased, is admissible, in a proper case. *Chase v. Deholt*, 7 Ill. 371.

It should be stated that, in order to use such evidence, unless it is waived by the opposite party, a copy of the record of the former action must be produced, but if it is the *same* action, this is not necessary, nor if the action is before the same court. *Chambers v. Hunt*, 22 N. J. 552.

The judge's minutes of the evidence given by the witness on the trial are not admissible, though certified by him; *Miles v. O'Hara*, 4 Binn. (Penn.) 108; but they are competent evidence when the judge swears to their correctness. *Whitcher v. Morey*, 39 Vi. 459.

spring, the number of persons interested in preserving the recollection of the matters in question, and the consequent facilities for detecting false testimony.¹ Now it is obvious that rights of public or general interest, which are supposed to have been exercised in times past, partake, in some degree, of the nature of historical facts, and especially in this, that it is rarely possible to obtain original proof of them. The law accordingly allows them to be proved by general reputation — *e. g.*, by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject;² by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, &c. But in *order to guard against fraud, it is an established principle that such declarations, &c., [* 631] must have been made “*ante litem motam*,”—an expression which has caused some difference of opinion, but which seems to mean, before any *controversy* has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit.³ The value of this species of evidence manifestly depends on the degree of publicity of the matters in question; and also, when in a documentary shape, on the facilities or opportunities which may exist for substitution or fabrication. (a)

¹ Introd. pt. 2, §§ 50 *et seq.*

² See *Crease v. Barrett*, 1 C. M. & R. 919.

³ 1 Phill. Ev. 194, 10th Ed.; Tayl. Ev. §§ 515 *et seq.*, 4th Ed.; *Butler v. Lord Mountgarrett*, 7 Ho. Lo. Cas. 633.

(a) The declarations of a deceased person, having no interest in the matter, are admissible to establish an ancient boundary; *Porter v. Warner*, 2 Root (Conn.), 22; thus, it has been held that what one, now dead, heard another, also dead, say in reference to a certain boundary, may be given in evidence in

Matters of pedigree—Must be “ante litem motam.”

§ 498. 3. Matters of pedigree: *E. g.*, the fact of relationship between particular persons; the births, marriages, and deaths of members of a family, &c., form the next exception.¹ “Quoties quæreretur, genus vel gentem quis haberet, necne, eum probare oportet.”² These likewise partake of the nature of historical facts in this, that they usually refer to matters which have occurred in times gone by, and among persons who have passed away; though in attempting to prove them by derivative evidence the check afforded by notoriety is wanting, seeing that they are matter of interest to only one, or at most a few families. Still the extreme difficulty of procuring any better evidence compels the reception of this, when it comes from persons most likely to be acquainted with the truth, and under no temptation to misrepresent it. Thus, declarations of deceased members of a family,

¹ 1 Phill. Ev. ch. 8, sect. 4, 10th Ed.; Tayl. Ev. Part 2, ch. 9, 4th Ed.; *Att.-Gen. v. Köhler*, 9 Ho. Lo. Cas. 654, 670.

² Dig. lib. 22, tit. 3, l. 1.

reference to that boundary; *Bland v. Talbot*, Cooke (Tenn.), 142; so what the plaintiff's ancestors said in reference to a boundary; *Howell v. Tilden*, 1 Harr. & McHen. (Md.) 84; but what a deceased surveyor said in reference to a boundary, *Cherry v. Boyd*, Litt. Sel. Cas. (Ky.), or a deceased chain-bearer, has been held not admissible; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; but, *contra*, see *Miller v. Wood*, 40 Vt. The rule in reference to the admissibility of this species of evidence seems to be that the declarations of an aged deceased person having means of knowledge, and having, at the time when they are made, no interest to misrepresent, are admissible to establish an ancient boundary, or to identify an ancient monument, but not to establish ownership; *Wendell v. Abbott*, 45 N. H. 349; nor, unless the declarations were made in the vicinity of the boundary, and such a length of time has elapsed since they were made that there can be no reasonable probability that evidence can be obtained from living witnesses having actual knowledge upon the subject. *Wood v. Willard*, 37 Vt. 377.

made of course "*ante litem motam*;"¹ the general reputation of a family proved by a surviving member of it; entries contained *in books, such as family bibles, if produced from the proper custody, [* 632] even although there be no evidence of the handwriting or authorship of such entries;² correspondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin plates; charts of pedigrees, made or adopted by deceased members of the family, &c., have severally been held receivable in evidence for this purpose.³ And it is impossible to dispense with this kind of evidence, especially in proof of remote and collateral matters; but tribunals should be on their guard, when the actual point in issue in a cause depends wholly or chiefly upon it. It is, from its nature, very much exposed to fraud and fabrication; and even assuming the declaration, inscription, &c., correctly reported by the medium of evidence used, many instances have been shown how erroneous is the assumption that all the members of a family, especially in the inferior walks of life, are even tolerably conversant with the particulars of its pedigree.⁴(a)

¹ See 1 Phill. Ev. 206, 10th Ed.; *Gee v. Ward*, 7 E. & B. 509.

² *Hubbard v. Lees*, L. Rep., 1 Ex. 255, 258.

³ In a suit in which the plaintiff alleged that he was the natural son of A., a declaration by a deceased brother of A., that the plaintiff was A.'s natural son, was held to be inadmissible. *Crispin v. Doghioni*, 32 L. J., P. & M. 109.

⁴ See the judgment of the Master of the Rolls in *Crouch v. Hooper*, 16 Beav. 182.

(a) It is now regarded as well settled that, where no better evidence exists, and the facts sought to be established are so ancient that the positive evidence of living witnesses cannot be procured, hearsay evidence will be received to establish pedigree and relationship. But, in such case, the evidence should come from some one connected with the family whose pedigree or relationship to a deceased person is sought to be established, by blood, or from some one

Ancient possession.

§ 499. 4. The next instance in which this rule is relaxed seems to rest even more exclusively on the principle of necessity; namely, that ancient documents,

who has some personal knowledge of the family, or the facts of which they speak, or those who have derived knowledge relative thereto from persons connected with the family, or those particularly acquainted therewith, or the evidence will not be received; *Carter v. Buchanan*, 9 Ga. 539; *Jackson v. Browner*, 18 Johns. (N. Y.) 37; *Moers v. Bunker*, 29 N. H. 420; *Strickland v. Poole*, 1 Dallas (U. S.), 14; *Kelly v. McGuire*, 15 Ark. 555; *Greenwood v. Spiller*, 3 Ill. 502; *Armstrong v. McDonald*, 10 Barb. (N. Y.) 300; *Binney v. Ham*, 3 A. K. Marsh. (Ky.) 322; *Crawford v. Blackburn*, 17 Md. 49; *Kaywood v. Barnett*, 3 Dev. & B. (N. C.) 91; *Chapman v. Chapman*, 2 Conn. 347; *Everingham v. Mesroom*, 2 Brev. (S. C.) 461; *Gilchrist v. Martin*, 1 Bailey (S. C.), 492; *Webb v. Richardson*, 42 Vt. 465; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Elliott v. Piersoll*, 1 Pet. (U. S.) 328; *Waldron v. Tuttle*, 4 N. H. 371; *Stein v. Bowman*, 13 Pet. (U. S.) 209; as to prove who are heirs of a deceased person; *Greenwood v. Spiller*, 3 Ill. 502; so to prove who was the mother of a child the declarations of a father in reference thereto may be received; *United States v. Saunders*, 1 Hempst. (Tenn.) 483; so, too, the declarations of a mother in reference to the paternity of her son may be given in evidence; *Canjolle v. Ferrie*, 26 Barb. (N. Y.) 177; so the declarations of any deceased person, as to who were his or her heirs; *Mottitt v. Witherspoon*, 10 Ired. (N. C.) 185; so to prove the death of a person after the lapse of a long time in which he has not been heard from; *Miner v. Boneham*, 15 Johns. (N. Y.) 226; *Stouvenel v. Stevens*, 2 Daly (N. Y. C. P.), 319.

But this species of evidence, coming from living persons connected with the persons deceased, and the declarations of such deceased persons are entitled to more weight than those coming from persons who had no connection with the family. *Saunders v. Fuller*, 4 Humph. (Tenn.) 516. And all such evidence is to be weighed in view of the circumstances under which the declarations were made, whether any litigation had been commenced involving the relationship, and all the circumstances calculated to throw any light upon the motives or interest of the person in making them. *United States v. Saunders*, 1 Hempst. (Tenn.) 483; *Canjolle v. Ferrie*, 2 Barb. (N. Y.) 177.

The rule in reference to this class of evidence was given by the court in *Stein v. Bowman*, 13 Pet. (U. S.) 209, thus: "The hearsay evidence admissible in cases of pedigree is limited to those connected with the family who are supposed to have known the relationship existing, and must have been made before the suit was commenced."

In *Jackson v. Browner*, 18 Johns. (N. Y.) 37, it was held that "where the witnesses are not connected with the family, have no personal knowledge of

purporting to constitute part of, or at least to have been executed contemporaneously with, the transactions to which they relate, are receivable as evidence of ancient

the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard or understood, such evidence is insufficient to establish pedigree."

In *Elliott v. Piersoll*, 1 Pet. (U. S.) 328, where a letter from a deceased member of a family, stating the pedigree of the family, sworn to by the wife as having been written by her husband, and as containing facts of which he had often spoken to her in his life-time, was offered, it was held that both the letter and the testimony of the wife were competent evidence.

So, too, in questions of pedigree, the declarations of deceased members of a family in reference to marriages are admissible; but, when the marriage is essential to be established as a substantive fact, it cannot be established by such declarations. *Westfield v. Warren*, 8 N. J. 249.

The date of the birth of a child may be proved by the declarations of deceased members of the family, even though there is a family register in which the birth of the child is registered. The reason for this rule is, that both species of evidence are of equal weight and character; the one not being entitled to any more consideration than the other; *Clements v. Hunt*, 1 Jones (N. C.), 400; but its age cannot be established in this way; *Albertson v. Robertson*, 1 Dallas (U. S.), 9; nor the *place* of its birth; *Wilmington v. Burlington*, 4 Pick. (Mass.) 174; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Independence v. Pompton*, 4 Halst. (N. J.) 209; *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; or any fact that is susceptible of proof by witnesses who speak from their own knowledge; *Mima Queen v. Hepburn*, 7 Cranch (U. S.), 290; so hearsay evidence is admissible in some States to prove the marriage of parties by proving cohabitation. *O'Gara v. Eisenlohr*, 38 N. Y. 296.

So it is competent to prove, by the declaration of the parents of a child, whether they were married when the child was born; but such evidence is not admissible to prove that children born in wedlock are illegitimate by reason of non-access; *Stevens v. Moss*, Cowper, 491; *Bowles v. Bingham*, 2 Munf. (Va.) 442; so such evidence is admissible to prove whom a man married, or whom a woman married, what children they had, whether legitimate or illegitimate, that either died abroad; and these facts may be established by the declarations of deceased members of the family, but the declarations of those not connected with the family (as neighbors or acquaintances) are not receivable; *Vowles v. Young*, 13 Ves. Jr. 140; *Whitlock v. Baker*, id. 511; so in such cases recitals in old deeds are evidence; *Little v. Palister*, 4 Greenl. (Me.) 209; *Buller's Nisi Prius*, 238, 294; *Morris v. Vandever*, 1 Dallas (U. S.), 67; *Paxton v. Price*, 1 Yeates (Penn.), 500; inscriptions on old gravestones, the finding of a special verdict between other members of the family stating a pedigree, the statement of a pedigree in an old bill in chancery, as well as herald books and entries in

possession, in favor of those claiming under them, and even against others who are neither parties nor privies to them.¹ "The proof of ancient possession is always

¹ 1 Phill. Ev. ch. 8, sect. 5, 10th Ed.; Tayl. Ev. Part 2, ch. 10, 4th Ed.

family Bibles; *Curtis v. Patton*, 6 S. & R. (Penn.) 135; *Kidney v. Cockburn*, 2 R. & M. 163; *Taylor v. Cole*, 7 T. R. 3; *Lovell v. Arnold*, 2 Munf. (Va.) 167; *Pegram v. Jabbell*, 2 Harr. & Munf. (Va.) 281; *Whittuck v. Waters*, 4 C. & P. 376; *Goodright v. Moss*, 2 Cowp. 594; but, so far as the allegations in a bill in chancery are concerned, it is proper to say that generally, under the modern rules of evidence, such evidence is not regarded as admissible; but if the circumstances, the relations of the parties and the nature of the issue are such as to afford no ground for supposing that the orator's mind had any bias, and that, so far as these facts are concerned, he had no interest to serve, there can be no question but that the evidence would be received for what it is worth in the establishment of a pedigree; *Berkley's Peerage Case*, 2 Bing. 86; 2 Selwyn's *Nisi Prius*, 684; so statements in old wills bearing upon questions of pedigree or relationship, although the will is canceled, and never was operative, but which was found among the papers of the testator, a deceased member of the family, whose pedigree are in question, is admissible; *Johnson v. Earl Pembroke*, 11 East, 503; so a register of births and marriages kept in the records of a town is admissible on questions of pedigree; *Miner v. Boneham*, 15 Johns. (N. Y.) 226; so *ex parte* affidavits taken abroad have been held admissible to prove pedigree, and to establish boundaries; also to establish the identity of a person; *Taylor v. Simpson*, 2 Dall. (U. S.) 117; *Sturgeon v. Waugh*, 2 Yeates (Penn.), 467; *Lilly v. Kintzmillier*, 1 id. 28; so depositions of deceased witnesses, used in a cause between other parties, are admissible upon a question of pedigree, whether taken before or after the litigation commenced in which the question of pedigree is involved; *Peake's Ev.* 24, note, citing MS. case of *Bordereau v. Montgomery*; *Jenkins v. Tom et al.*, Wash. (U. S.) 123; *Lovell v. Arnold*, 2 Munf. (Va.) 167. Inscriptions upon rings worn by a former member of the family are held admissible to prove pedigree. *Vowles v. Young*, 13 Ves. 144.

Lord Erskine, in commenting upon the class of evidence competent to prove a pedigree, said: "Upon questions of pedigree, inscriptions upon tombstones are admitted, as it must be supposed that the relations of a family would not permit an inscription without foundation to remain. So engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it."

Charts of pedigree hung up in a family mansion, or in a situation to indicate that it was recognized and accepted by the family as correct, *Goodright v. Moss*, 2 Cowper, 594, coat armor, *Coke's Littleton*, 27 a, and *mural inscriptions* giving an historical account of a family placed in a chancel which was formerly used as a burial place for the family, located in a parish where the

* attended with difficulty. Time has removed the witnesses who could prove acts of ownership [* 633] of their personal knowledge, and resort must necessarily

family were long resident proprietors, have been also held admissible; and, where the articles themselves cannot be produced, copies thereof may be used; *Slaney v. Ward*, 1 My. & Cr. 354. In this case, which involved a question of pedigree, the existence of the mural inscriptions and their obliteration, about twenty-four years before the trial, was established; and the court held that a copy thereof was competent evidence, provided the genuineness of the original inscriptions was established. This class of evidence, however, may always be impeached, and Mr. Phillips, in vol. 1, p. 222, of his work on Evidence, gives several instances in which that species of evidence has been completely overthrown. None of this species of evidence is conclusive, but its genuineness and the weight to be given it depend largely upon the circumstances of each case, the condition in which it was found, and a multitude of circumstances that tend to convince the mind that a thing is real or spurious, in reference to which no rules can be given.

So it may be said, generally, that any species of evidence tending to show the declarations of deceased relatives upon the question of relationship, which is established as genuine, and which leaves no doubt as to their understanding of the matter, is always admissible to establish pedigree. The register of births, deaths or marriages, in a family bible; *Leggett v. Boyd*, 3 Wend. (N. Y.) 376; *Goodright v. Moss*, Cowp. 594; *Whitlock v. Baker*, 13 Vesey, 511; *Higham v. Ridgway*, 10 East, 120. In the *Berkley Peerage Case*, 4 Camp. 421, Lord Redesdale, in commenting upon this class of evidence, said: "The circumstance of an entry being in a family bible, to which all the family has access, gives it that validity which it would not have if the book remained in the exclusive possession of the father. Entries in family bibles have, therefore, become common evidence of pedigree in this country; and in America, where there is no register of births or baptism, *hardly any other is known*;" or in the diary of a physician who was present at the birth of a child; *Ames v. Middleton*, 23 Barb. (N. Y.) 571; so memoranda in other books, as an almanac, *Herbert v. Tucknall*, L. Raym. 84; a prayer book; *Leigh's Peerage*, printed in 1829, p. 310; as well as entries in any other documents, books or papers, kept in and accessible to the family, are admissible. Lord Mansfield, in *Berkley Peerage Case*, 4 Camp. 418, says: "Now, I know no difference between a father writing any thing respecting his son in a bible, and his writing it in any other book, or on any other piece of paper; therefore, the answer I would give is, that such a writing by a father in a bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and, like other declarations of the father, might be admitted in evidence." Lord Brougham, in *Monkton v. The Attorney-General*, 2 Rus. & My. 147, elaborately discusses the classes of evidence admissible in questions of pedigree, and the rules that should govern courts in its admis-

be had to written evidence.”¹ In order to guard against the too manifest dangers of this kind of proof, it is established, as a condition precedent to its admissibility, that

¹ Per Willes, J., delivering the opinion of the judges in *Malcomson v. O’Dea*, 10 Ho. Lo. Cas. 593, 614.

sion or rejection; and, although it will occupy considerable space, I conceive that the importance of the subject, and the clearness with which he gives the rules, and the inaccessibility to a large portion of the profession to the volume of reports in which it is to be found, will justify me in giving the main portion of the decision in his own language. He said, “I agree that, in order to admit hearsay evidence in pedigree, *you must, by evidence dehors the declarations, connect the person making them with the family.* But I cannot go the length of holding that you must prove him to be connected with *both* branches of the family, touching which his declaration is tendered. *That he is connected with the family is sufficient; and that connection once proved,* his declarations are then let in *touching that family.* Not declarations of details which would be evidence, *but declarations of the nature of pedigree; that is to say, of whom is related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or affinity only, when the parties died, or whether they are actually dead—every thing, in short, which is, strictly speaking, matter of pedigree may be proved as matter relating to the condition of the family by the declarations of deceased persons who, by evidence dehors those declarations, have been previously connected with the family respecting which their declarations are tendered.* To say that you cannot receive in evidence the declaration of A, who is proved to be a relation by blood to B, touching the relationship of B with C, unless you have first connected him also, by evidence *dehors* his declaration, with C, is a proposition which has no warrant either upon the principle upon which hearsay is let in, or in the decided cases; and it plainly involves this absurdity, that if, in order to connect B with C, I am first to prove that A is connected with B, and then to superadd the proof that he is connected with C, I do a thing which is vain and superfluous; for then the declaration is used to prove the very fact which I have already established, as it is not more true that things which are equal to the same thing are equal to one another, than that persons related by blood to the same individual are more or less related by blood to each other. It is clear, both upon principle and upon the total want of any contrary authority in adjudged cases, or in the *dicta* of judges or text-writers, that the argument fails entirely, which would limit the rule respecting evidence of this description to a greater extent than by requiring you to connect with the family, by matter *dehors* the declaration itself, the party whose declaration you receive.

Neither can I accede to another limitation, for which an argument was attempted to be raised, that the declarations themselves must be looked at, to

the document must be shown to have come from the proper custody, *i. e.*, to have been found in a place in which, and under the care of persons with whom, it

see whether they are *contemporaneous* or not. I do not understand this restriction, now, for the first time, sought to be engrafted upon the rule; *but I understand very well how absurd it would be if introduced*; how completely it would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the life-time of the person whose declaration is to be adduced in evidence. A person's declaration that his grandmother's maiden name was A. B. has never, until this time, been questioned as admissible, although it cannot, by a possibility, be what is called a contemporary declaration, because no man can, by possibility, have contemporary knowledge of what his grandmother's name was before she was married. If, therefore, the word *contemporary* is to be added as a qualification to the subject-matter of a declaration, in order to make it competent evidence, all such declarations would then clearly be excluded, as go to facts, however well known in the family, which are the common matter of such evidence; and, in cases of pedigree, you could never go farther back than the recollection of the party swearing to the declaration of the deceased, and the life since the years of discretion, or the life, when memory begins to operate, of that deceased person; a restriction which has never been acted upon by any judge, or sanctioned by any text-writer, and never, to my knowledge, contended for at the bar.

It is then asked, shall we have no restrictions whatever upon the admissibility of such evidence in respect of the subject-matter? I have already stated one important restriction arising from the position in which the party whose declaration is received must necessarily stand to the family. *Having once shown him to be a member of the family by matter dehors*, you may admit his declaration in reference to the relationship of any member of that family with any other, or as to the question whether a certain person is a relation of that family.

But is there no further restriction touching the *subject-matter* and touching the *manner* in which the declaration is made? Clearly there is, and nothing can be more satisfactory, or more consistent with good sense, or with legal principles and decided cases, than the summary of the doctrine given by Lord Eldon in *Whitlock v. Baker*, 13 Ves. 511. His lordship there observes that the admissibility of such evidence is founded upon the presumption that the words given in evidence are the natural effusion of the party; and that, generally speaking, he must have no bias upon his mind. But, even here, there must be a limit. It will be no valid objection to such evidence that the party may have stood, or thought he stood, in *pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for it has been decided that, although the party deceased was in *pari casu*, and, if he had been living, might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it.

might naturally and reasonably be expected to be found ;¹ although it is no objection that some other *more* proper place, &c., may be suggested.² The elder civilians

¹ *The Bishop of Meath v. The Marquess of Winchester*, 3 Bingh. N. C. 200, 202.

² *Id.* ; *Croughton v. Blake*, 12 M. & W. 205 ; *R. v. Mytton*, 2 E. & E. 557.

With the exception of what is said in Drummond's Case, 1 Leach's Cr. Ca. 378, where the evidence is clearly inadmissible upon other grounds, I can find no warrant for asserting that if you tender the evidence of a man by way of hearsay in a case of pedigree, that evidence is inadmissible when it comes from a person who stood *in pari casu* with the party tendering it. Lord Tenterden, in *Doe v. Turner*, 1 Ry. & Moo. 142 (Lord Brougham is in error ; it was Lord Ch. J. Abbott, instead of Lord Tenterden, who rendered the opinion in this case, and the real name of the case is Doe on the Demise of Tittman *v. Tarver* Ed.), states the law to be directly the other way, and he refers to a peerage case in the House of Lords, where the declarations of a deceased husband were given in evidence on the part of his son, although the husband was so far *in pari casu* with the claimant, that if the son was entitled to the peerage, then the husband ought to have been a peer likewise. A stranger instance of similarity than this can hardly be conceived, and the case certainly seems to go a great way. But, without pronouncing an opinion upon that decision, it is perfectly settled, both upon reason and authority, that the rule cannot be so far restricted as to exclude evidence on account of the bias supposed to operate on the person making the declaration, in consequence of his being in the same situation touching the matter in contest, with the person relying on the declaration.

One restriction, however, must clearly be imposed ; the declarations must be *ante litem motam*. If there be *lis mota*, or any thing which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was making evidence for himself. If he be in such circumstances that what he says is said not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest, after his death, it is excluded, both upon principle and upon the authority of the cases, and among others of *Whitlock v. Baker*. There is a still more distinct authority in the Berkley Peerage Case, 4 Camp. 421, where Mr. Justice Lawrence adopts almost the very language of Lord Eldon, and where proceedings in equity having been instituted to perpetuate testimony, evidence of declarations was rejected upon the ground of *litis contestatio*. Subject to that limitation, therefore, the rule as to declarations is to be taken. And regard must also be had to the occasion on which the party has emitted them. Whatever applies to the evidence of a witness spoken in the box applies equally to written declarations, provided they are brought home to the person who

applied, with tolerable justice, the term "*piscatio anguillarum*" to the proof of immemorial possession.⁴

¹ Bonnier, *Traité des Preuves*, § 732.

is supposed to have made them. Till then they are not declarations of one connected with the family. The occasion upon which the declaration is made is therefore to be taken into account.

It was then asked, as an argument for a further restriction of the rule, "if a man sit down to frame a pedigree, how can you receive that pedigree in evidence like an ordinary declaration, when, *non constat*, he may have been in the act of making evidence for himself, by preparing a document which should afterward profit him, or those in whom he is interested?" To that I answer, *show me that the pedigree in question was prepared with that view.* Bring it within the rule either of *Whitlock v. Baker*, or the *Berkley Peerage Case*; *prove* that it was made *post litem motam*, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; *show me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose by a man who has an interest of his own to serve.* The question, then, always will be, *was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?* If I thought that this came within the description of manufactured evidence, manufactured for a purpose connected with the present controversy, I should, of course, at once have rejected it. But upon looking at it, and examining it, I cannot, upon the whole, bring my mind to say that it was fabricated in such circumstances, or with such a view, as would bring it within the principle adverted to.

The competency of pedigree, in such questions, has frequently been made the subject of comment, and even of judicial decisions. One simple form of pedigree, or, rather, the heads of memoranda furnishing the materials for a pedigree, is constantly admitted by every day's practice. I mean entries in *family bibles* or *other books kept in the family*; a *memorandum book*, an *old almanac*, for instance, which is not so much open to the whole family as a family bible is, has, upon one occasion, been received; but a family bible is open undoubtedly to the family, which may be one ground of its admissibility; and I also find, on the authority of Lord Mansfield, that a pedigree is admissible to prove the facts contained in the pedigree, if it be hung up in the family mansion. A ring worn publicly, stating the date of the person's death whose name is engraved on it, and an inscription upon a tombstone open to all mankind, and erected, or supposed to be erected, by the family, are also received in evidence.

It is urged, however, and with considerable plausibility, that the principle of all these cases would exclude such a pedigree as this, which was not hung up, or in any way made public, and to which it is not pretended that any one had

Declarations by deceased persons against their interest.

§ 500. 5. Declarations made by deceased persons, against their own interest, are receivable in evidence in proceedings between third parties,¹ provided such decla-

¹ 1 Phill. Ev. ch. 8, sect. 7; Tayl. Ev. Part 2, ch. 11, 4th Ed. The leading case on this subject is *Higham v. Ridgway*, 10 East, 109; set out and commented on in 2 Smith, Lead. Cas. 271, 5th Ed.

access except the writer himself. But why is it that the publicity is relied on in those cases? Why is it that the family bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of a family pedigree in a mansion, are all relied upon in respect of their publicity?

It is because, in all those cases, the publicity supplies a defect there existing, but not here existing — the want of connection between the pedigree, the tombstone, the ring, or the bible, with particular individuals, members of the family. Why is it, for example, that a pedigree hung up in a family mansion is good evidence, although the person who made it is unknown, and is not proved by matter dehors the document itself, to have been connected with the family? Simply because of its being hung up in the mansion, where (the presumption is) it would not be suffered to remain, if the whole family did not more or less adopt it, and thereby give it authenticity. It is for that reason you admit such a pedigree, without knowing who may have been the author. The present question, however, is simply this, whether the pedigree would not be admissible, if, instead of being publicly hung up, it were kept in the repositories of one of the family, providing you can show that it is in the handwriting of one of the members of that family? In this case the question is clearly distinguishable from those which appear to require the publicity of the document in order to make it competent evidence.

Adverting more particularly here to the authority of Lord Mansfield, in *Goodright v. Moss*, Cowp. 594, “an entry in a father’s family bible,” says his lordship, “an inscription on a tombstone, a pedigree hung up in the family mansion, are all good evidence.” What follows clearly shows that Lord Mansfield did not consider publicity indispensable, and it is equally clear that he did not consider the circumstance of a man, who makes a pedigree, or an entry, or a declaration in writing, or even a declaration in conversation, having an object in making it, *provided that object was not connected with a controversy touching the matter in question*, a sufficient ground to exclude such evidence. His lordship’s words are, “I have known advice given to a father and mother to make attested declarations in writing, under their hand, of the precise time of the birth of the bastard *eigne*, and the subsequent marriage, to prevent controversy in the family touching the inheritance.” This may be said, perhaps, to be going great lengths, but at all events it sanctions the doctrine *that the*

rations were made against *proprietary* or *pecuniary* interest,² and do not derogate from the title of third parties; *e. g.*, a declaration made by a deceased tenant is not admissible if it derogates from the title of the reversioner.³

The admissibility of declarations against interest * made by parties to a suit rests on a different principle.⁴ The ground of this exception is [* 634] the improbability that a party would falsely make a

¹ *Reg. v. Exeter*, L. Rep., 4 Q. B. 341.

² *The Sussex Peerage case*, 11 Cl. & F. 85. See *R. v. The Overseers of Birmingham*, 1 B. & S. 763.

³ *Papendick v. Bridgwater*, 5 E. & B. 166.

⁴ *Infra*, ch. 7.

having a distinct object in view in making a declaration in writing or by parol, even though the object can only be attained by afterward using the declaration in evidence, is not sufficient per se to exclude that declaration; for," continues Lord Mansfield, "*if the credit of such declarations is impeached, it is for the jury to judge of it.*" In plain terms, if a father or mother make a pedigree for the purpose of preventing disputes in the family, his lordship says, "he will admit that pedigree in evidence even when those very disputes arise, because it was not made with a view to their own interest;" but, to preserve a *constat*, as it were, a record of facts peculiarly within their knowledge, which is one of the main grounds of admitting such hearsay declarations, and the observations that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the judges would seem to require, *shall only go to its weight and credit with the jury, and shall not preclude its admission by the court.*

Another restriction was a good deal pressed, *that you cannot mount hearsay upon hearsay*, but that what is given in evidence as hearsay must only be in the first degree, so to speak; in other words, that, after connecting A with the family, it is competent, after his death, to give in evidence declarations made by A, as to what came within his own personal knowledge, but not declarations as to what he had heard respecting the family from others. *There is no warrant, however, for any such distinction. The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, "and the subject-matter of that tradition can be perpetuated in testimony."*

declaration to fix himself with liability; but cases may be put where his doing so would be an advantage to him. *E. g.*, the accounts of the receiver or steward of an estate have, through neglect or worse, got into a state of derangement, which it is desirable to conceal from his employer; and one very obvious way of setting the balance straight is by falsely charging himself with having received money from a particular person.

Declarations by deceased persons in the regular course of business, &c.

§ 501. 6. Allied to these are declarations in the regular course of business, office, or employment, by deceased persons, who had a personal knowledge of the facts, and no interest in stating an untruth.¹ But the rule as to the admission of such evidence is confined strictly to the particular thing which it was the duty of the person to do; and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing.² And it is also a rule, with regard to this class of declarations, that they must have been made *contemporaneously* with the acts to which they relate.³

It seems that neither of these classes of declarations need be in a written form.

§ 502. In both classes, viz., declarations against interest, and declarations in the regular course of busi-

¹ 1 Phill. Ev. ch. 8, sect. 8; Tayl. Ev. Part 2, ch. 12, 4th Ed. For the authorities on this subject, see the note in 1 Smith, Lead. Cas. 277, 5th Ed., to the case of *Price v. The Earl of Torrington* (reported 1 Salk. 285; 2 Ld. Raym. 873; Holt, 300).

² Per Blackburn, J., *Smith v. Blakey*, L. Rep., 2 Q. B. 326, 332.

³ *Doe d. Patteshall v. Turford*, 3 B. & Ad. 898, per Parke, J.; *Short v. Lee*, 2 Jac. & W. 475, per Sir T. Plumer, M. R.

ness, &c., the evidence commonly appears in a written form; and it has even been made a question whether *this is not essential to its admissibility.¹ But the inclination of the authorities is rather to [* 635] the effect that *verbal* declarations, answering, of course, all other requisite conditions, are equally receivable;² and, indeed, it seems difficult to establish a distinction in principle between the cases.

Tradesmen's books.

§ 503. 7. The civil law,³ and the laws of some other countries,⁴ receive the books of tradesmen, made or purporting to be made by them in the regular course of business, as evidence to prove a debt against a customer or alleged customer. Sensible of the weakness and danger of this sort of evidence, the civilians only allowed it the force of a semi-proof; and, by thus investing it with an artificial value, increased the danger of receiving it.⁵ There is no analogy between entries made in his books by a living tradesman and entries made in those books

¹ *Fursdon v. Clogg*, 10 M. & W. 572.

² *Sussex Peerage case*, 11 Cl. & F. 113, per Ld. Campbell; *Stapylton v. Clough*, 2 E. & B. 933; *Eddie v. Kingsford*, 14 C. B. 759, 763.

³ Heinec. ad Pand. pars 4, § 134; 1 Ev. Poth. § 719. This is the well-known doctrine of the civilians, which was implanted by them in most countries of Europe, and at one period seems to have obtained a footing in our own. See 7 Jac. 1, c. 12. But it may well be a question whether the doctrine was derived from the *Roman* law; if so, it is wholly at variance with the principles laid down in other parts of the *Corpus Juris Civilis*. *E. g.*: “Exemplo perniciosum est, ut ei scripturæ credatur, quâ unusquisque sibi adnotatione propriâ debitorem constituit. Unde neque fiscum, neque alium quemlibet ex suis subnotationibus debiti probationem, præbere posse oportet.” Cod. lib. 4, tit. 19, l. 7. “Factum cuique suum, non adversario nocere debet.” Dig. lib. 50, tit. 17, l. 155. See, also, Dig. lib. 2, tit. 14, l. 27, § 4; Cob. lib. 7, tit. 60, ll. 1 & 2.

⁴ Tayl. Ev. §§ 641–3, 4th Ed.

⁵ Heinec. in loc. cit. See Benthams comment on the civil law practice in this respect, 5 Jud. Ev. 481, 482; and *suprà*, Introd. pt. 2, § 70, p. 107, note 6.

by a clerk or servant who is deceased, and who, in making them, probably charged himself to his master. And turn or torture this question *as we will, to [* 636] admit the former is a violation of the rule, alike of law and common sense, that a man shall not be allowed to manufacture evidence for himself.¹ It is true that tradesmen's books are usually kept with tolerable, and, in some instances, with great accuracy ; but may not the reason of this be, that, as the law will not allow them to be used for the purpose of fraudulently charging others, they are now kept for the sole and *bond fide* purpose of refreshing the memory of the tradesman as to what goods he has supplied? Besides, it is to be observed that almost all the advantage derivable from tradesmen's books, with little or none of their danger, is obtained under the law as it now stands. For not only may the tradesman appear as a witness,² and use his books as memoranda to refresh his memory with respect to the goods supplied,³ but those books are always available as "indicative" evidence,⁴ and, especially in the event of the bankruptcy of the tradesman, they are often found of immense value to himself or those who represent him.

Books of deceased incumbent.

§ 504. 8. Books of a deceased incumbent — rector or vicar — containing receipts and payments by him relative to the living, have frequently been held receivable in evidence for his successors.⁵ This has been com-

¹ *Infra*, ch. 5 and ch. 7.

² Bk. 2, pt. 1, ch. 2.

³ Bk. 2, pt. 3, ch. 1.

⁴ For "indicative evidence," see bk. 1, pt. 1, § 93.

⁵ See the cases collected, 1 *Phill. Ev.* 267-9, 10th Ed.

plained of as anomalous;¹ but the admissibility of such evidence was fully recognized in the comparatively recent case of *Young v. The Master of Clare Hall*;² where, however, the court assigned no reason for their decision, apparently deeming the question settled by authority. So evidence has been admitted of declarations by a deceased rector, as to a custom in the parish relative to the appointment of [* 637] churchwardens.³

Dying declarations.

§ 505. 9. The last exception to this rule is that of declarations made by persons under the conviction of their impending death.⁴ “*Nemo moriturus præsumitur mentiri*”⁵—the circumstances under which such declarations are made, may fairly be assumed to afford a guarantee for their truth, at least equal to that of an oath taken in a court of justice. Hence the dying declarations of a child of tender years will be rejected, unless he appears to have had that degree of religious knowledge which would render his oath receivable;⁶(a) as likewise will

¹ 1 Ph. Ev. in loc. cit.

² 17 Q. B. 529.

³ *Bremner v. Hull*, L. Rep., 1 C. P. 748.

⁴ *Reg. v. Jenkins*, L. Rep., 1 C. C. 187; 1 Phill. Ev. ch. 8, sect. 6, 10th Ed.; Tayl. Ev. Part 2, ch. 13, 4th Ed.

⁵ 2 Ho. St. Tr. 18.

⁶ Bk. 2, pt. 1, ch. 2.

(a) In order to make the declarations of a person *in extremis* admissible in evidence against his alleged murderer, they must be made under expectation of death and a settled conviction that he must die, as the result of the injury, and after all hope of recovery therefrom is gone; *People v. Green*, 1 Park. Cr. (N. Y.) 11; *State v. Cameron*, 2 Chand. (Wis.) 172; *State v. Pease*, 1 Jones (N. C.), 251; *State v. Center*, 35 Vt. 378; *Lewis v. State*, 17 Miss. 115; *United States v. Woods*, 4 Cranch (U. S. C. C.), 115; *Logan v. State*, 9 Humph. (Tenn.) 24; *Vass' Case*, 3 Leigh (Va.), 786; *Montgomery v. State*, 11 Ohio St. 424; *State v. Brunetto*,

those of an adult, whose character shows him to have been a person not likely to be affected with a religious sense of his approaching dissolution.¹

¹ 1 Phill. Ev. 242, 10th Ed. ; Appleton Evid. 203, note (v).

13 La. Ann. 45 ; *State v. Freeman*, 1 Speers (S. C.), 57 ; *Walston v. Com.* ; 16 B. Monr. (Ky.) 15 ; *People v. Sanchez*, 24 Cal. 17 ; if there is *any*, even a *faint*, hope of recovery, his declarations are inadmissible ; *People v. Robinson*, 2 Park. Cr. (N. Y.) 235 ; *State v. Nash*, 7 Iowa, 287 ; *Adwell v. Com.*, 17 B. Monr. (Ky.) 310 ; *Com. v. Dinsmore*, 12 Allen (Mass.), 535 ; and must relate exclusively to the facts of the injury. Opinions stated by the deceased are not admissible ; *United States v. Veicht*, 1 Cranch (U. S. C. C.), 115 ; *Starkey v. People*, 17 Ill. 17 ; as that a certain person was the only enemy he had ; *More v. State*, 35 Ala. 421 ; see, also, *McPherson v. State*, 22 Ga. 488 ; *Whitley v. State*, 38 id. 50. They may cover the conduct of the prisoner upon the occasion of the injury, and before, as regards the deceased ; but the statement of a distinct fact, in no wise connected with the circumstances of the death, is not admissible ; *Johnson v. State*, 17 Ala. 618 ; *State v. Terrell*, 12 Rich. (S. C.) 321 ; *State v. Thornley*, 4 Harr. (Del.) 562 ; *Hudson v. State*, 3 Cold. (Tenn.) 355 ; *State v. Shelton*, 2 Jones (N. C.), 360 ; *Carroll v. State*, 3 Humph. (Tenn.) 315 ; it is not essential that his statements should be reduced to writing and sworn to, although this gives them a higher character and more weight as evidence ; yet, if they *are* reduced to writing, the written statement must be produced or its loss shown, before the statement can be proved by parol ; *State v. Tweedy*, 11 Iowa, 350 ; *People v. Glenn*, 10 Cal. 32 ; *Nelms v. State*, 21 Miss. 500 ; *Collier v. State*, 20 Ark. 36 ; *Beets v. State*, 1 Meigs (Tenn.), 106 ; it is not essential that the statement should even be spoken, it may be made by signs, where the deceased was conscious at the time, but unable to speak. Thus in *Com. v. Casey*, 11 Cush. (Mass.) 417, the deceased was at the point of death, and conscious, but unable to speak ; and she was asked whether the respondent, naming him, was the person who inflicted the wounds upon her, and was requested, if he was, to signify it by squeezing the hand of the questioner ; she squeezed the hand of the questioner, and the court held that this evidence was admissible, and that the jury should pass upon its weight and credibility ; but that he should state every thing constituting the *res gestæ* of the subject of his statement, and it must be a full expression of all he intended to say conveying his meaning of such fact ; *State v. Patterson*, 45 Vt. 308 ; 12 Am. Rep. 200 ; but it must be shown that the deceased was conscious of what he was saying, and of the nature of the inquiries put to him, or the statement made by him will not be admissible ; *McHugh v. State*, 31 Ala. 318 ; and where such declarations are received they may be attacked or impeached in any of the legal modes ; *Goodall v. State*, 1 Oregon, 333 ; *State v. Thornley*, 4 Harr. (Del.) 562 ; *State v. Thomason*, 1 Jones (N. C.) 274 ; and such statements are never admissible in a civil suit brought against the defendant for damages resulting from the injury ;

The principal objection, however, to second-hand evidence is, not that it is not guarded by an oath, but that the party against whom it is offered is deprived of his power of cross-examining, and the jury of the opportunity of observing the demeanor of, the person whose testimony is relied on. Besides, if the solemnity of the occasion on which dying declarations are made constituted their *sole* ground of admissibility, it would not be

Daly v. N. Y., etc., R. R. Co., 32 Conn. 356; but see McFarland v. Shaw, 2 Law Repository (N. C.), 102, where it was held that the dying declarations of a daughter were admissible in an action brought by the father against one who had debauched her; see, *contra*, Wootin v. Wilkins, 39 Ga. 223; but see Wilson v. Boerum, 15 Johns (N. Y.) 286, where such declarations are held inadmissible in *any* case except in a prosecution for homicide; but in reference to this class of evidence it may be said that, in all instances where such statements are a part of the *res gestæ*, they are admissible in evidence upon the same principle that the declarations of a person injured, to his physician, as to how he feels and where he is injured, are admissible; thus, where a person is injured and almost instantly killed by a railroad accident, his declaration as to how the accident occurred is held admissible in a civil suit brought by his widow for damages; Brownell v. Pacific R. R. Co., 49 Mo. 239; but, when they are made under such circumstances as *not* to be a part of the *res gestæ*, they are never admissible; Friedman v. R. R. Co., 7 Phil. (Penn.) 203; Marshall v. Chicago, etc., R. R. Co., 48 Ill. 475; Wootin v. Wilkins, 39 Ga. 223. It is not necessary that death should immediately result from the injury in order to render the declarations of the deceased admissible; it is enough that there is no hope entertained by him of a recovery, and that the nature of the injury is such as to preclude all hope; thus, where the prisoner lived two days after the injury; State v. Pease, 1 Jones (N. C.), 251; so where he lived ten days; McDaniel v. State, 16 Miss. 401; so where he lived fifty-two days, Oliver v. State, 17 Ala. 587, the declarations were held admissible; and it may be stated as a general rule that it is not the length of time that the person lingers after the injury that determines the admissibility of his statements in evidence, but the simple fact whether, during that period, whether long or short, he had *any*, even the *faintest*, hope of recovery; if so his statements are *not* admissible, otherwise they are; and this is a question to be determined by the court according to the circumstances of each case; McLean v. State, 16 Ala. 672; Kilpatrick v. Com., 31 Penn. St. 198; State v. Nash, 7 Iowa, 347; State v. Scott, 12 La. Ann. 274; Ins. Co. v. Mosley, 8 Wall. (U. S.) 398; see Morgan v. State, 31 Ind. 193; Hackett v. People, 54 Barb. (N. Y.) 370; People v. Perry, 8 Abb. Pr. N. S. (N. Y.) 27; Young v. Com., 6 Bush (Ky.), 312.

confined, as it appears to be by law, to a solitary class of cases, *i. e.*, charges of homicide, where the language of the deceased referred to the injury which he expected would shortly cause his death.¹ Two other reasons [* 638] *plead for the reception of this evidence in those cases: 1. The difficulty of procuring better proof of the fact—the injured party being no more, the most obvious and direct source of evidence has perished; 2. Although society has an immense interest in punishing crimes of such magnitude, the witnesses who appear to prove them rarely have an interest in putting into the mouths of the dying persons language which they did not use. In civil matters it is far otherwise; as fatal experience has taught men in all countries where nuncupative wills have been allowed.

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* CHAPTER V.

EVIDENCE AFFORDED BY THE WORDS OR ACTS OF OTHER PERSONS.

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¹ *R. v. Mead*, 2 B. & C. 605, 608; *R. v. Hind*, Bell, C. C. 253. Some old cases in which such declarations were received in civil proceedings seem overruled by *Stobart v. Dryden*, 1 M. & W. 615, 626.

*Maxim "Res inter alios acta alteri nocere non debet" —
Other forms of it — Extent of it.*

§ 506. "Res inter alios acta alteri nocere non debet."¹
"Res inter alios actæ alteri nocere non debent."² No person is to be affected by the words or acts of others unless he is connected with them either personally, or by those whom he represents or by whom he is represented. To the above forms of the maxim, some books add, "sed quandoque prodesse potest,"³ or "sed potessee possunt;"⁴ and in some it runs, "nec nocere nec prodessee possunt."⁵ These additions are, however, unnecessary; for the rule is only of general, not universal, application, there being several exceptions *both ways. Neither does the expression "inter alios" mean that the act [* 640] must be the act of more than one person; it being also a maxim of law "factum unius alteri nocere non debet." And the Roman law, from which both maxims were probably taken, expressly says: "Exemplo perniciosum est, ut ei scripturæ credatur, quâ unusquisque sibi adnotatione propriâ debitorem constituit."⁶ Nor does it make any difference that the act was done or confirmed by

¹ Co. Litt. 152 b, 319 a; 2 Inst. 513; 6 Co. 51 b; Broom's Max. 857, 3rd Ed. This rule was well known at Rome. "Inter alios res gestas aliis non posse præjudicium facere, sæpe constitutum est:" Cod. lib. 7, tit. 60, l. 1. "Inter alios factam transactionem, absenti non posse facere præjudicium, notissimi juris est:" Id. l. 2. See, also, Dig. lib. 2, tit. 14, l. 27, § 4. So in the canon law, "Res inter alios acta aliis præjudicium regulariter non adfert." Lancel. Inst. Jur. Can. lib. 3, tit. 15, § 10.

² 12 Co. 126.

³ Wingate's Max. 327.

⁴ 6 Co. 1 b.

⁵ 4 Inst. 279. See, also, Bonnier, Traité des Preuves, § 692; and Cod. lib. 7, tit. 56, l. 2.

⁶ Co. Litt. 152 b.

⁷ Cod. lib. 4, tit. 19, l. 7; 1 Ev. Poth. § 724.

oath — “*jusjurandum inter alios factum nec nocere, nec prodesse debet*.”¹ — consequently the sworn evidence of a witness in a cause or proceeding cannot be made available in another cause or proceeding between other parties. One important branch of this rule — “*res inter alios judicata alteri nocere non debet*” — will be more properly considered under the head of *res judicata*.² When the person whose words or acts are offered in evidence is also the opposite party to the suit, the evidence is further inadmissible by virtue of another important principle — that no man shall be allowed to make evidence for himself;³ which, also, is in accordance with the Roman law, where it is laid down, “*Factum cuique suum, non adversario nocere debet*.”⁴

Distinction between “res inter alios acta” and derivative evidence.

§ 507. Following out the great principle which exacts the best evidence, it is obvious that things done *inter alios* or *ab alio* are even more objectionable than derivative or second-hand evidence. The two are, indeed, sometimes confounded; but there is this distinction between them: that derivative or second-hand evidence indicates *directly* a source of legitimate evidence, while *res inter alios acta* either indicates no such source, or at
 [* 641] *most only indirectly. Suppose, for instance, that, on an indictment for larceny, A. were to depose that he heard B. (a person not present) say that he saw the accused take and carry away the property,

¹ 4 Inst. 279. See Dig. lib. 12, tit. 2, l. 3, § 3, and l. 9, § 7, and l. 10.

² *Infra*, ch. 9.

³ See *infra*, ch. 7.

⁴ Dig. lib. 50, tit. 17, l. 155.

this evidence is objectionable as being offered *obstetricante manu*; but it indicates a better source, namely, B. Suppose, however, C. were to depose that he overheard two persons unknown forming a plan to commit the theft in question, in which they spoke of the accused as an accomplice who would assist them in its execution; this evidence is but *res inter alios acta*, for it shows no better source of legal proof; although as indicative evidence, and thus putting officers of justice, &c., on a track, it certainly might not be without its use.

The maxim does not exclude proof of res gestæ.

§ 508. There is likewise this point of resemblance between second-hand evidence and *res inter alios acta*, that the latter, like the former, must not be understood as excluding proof of *res gestæ*. The true meaning of the rule under consideration is simply this, that a party is not to be affected by what is done behind his back. But when the matter in issue consists of an act which is separable from the person of the accused, who is nevertheless accountable for it, proof may be given of that act before he is connected with it by evidence. This is best illustrated in criminal cases. Offenses, as has been shown in a former place,¹ are rightly divisible into *delicta facti permanentis* and *delicta facti transeuntis*; i. e., into offenses which leave traces or marks, such as homicide, arson, burglary, &c., and offenses which do not, such as conspiracy, criminal language, and the like. With respect to the former, it is every day's practice to give proof of a *corpus delicti*—that a murder, an arson, a burglary, &c., was committed—before any evidence is adduced affecting the accused, although without such

¹ *Supra*, ch. 2, sect. 3, sub-sect. 2.

[* 642] evidence the antecedent proof of * course goes for nothing. And the same holds when the offense is *facti transeuntis*. Thus, on an indictment for libel, proof may first be given of the libel, and the defendant may then be shown to have been the publisher of it. Another illustration is afforded by prosecutions for conspiracy, where it is a settled rule that general evidence may be given to prove the existence of a conspiracy, before the accused is shown to be connected with it;¹ for here the *corpus delicti* is the conspiracy, and the participation of the accused is an independent matter which may or may not exist. The rule that the acts and declarations of conspirators are evidence against their fellows rests partly on this principle, and partly on the law of principal and agent. The following summary of the practice, taken from an approved work,² is fully supported by authority: "Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law the act of the whole party; and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what

¹ See the authorities collected in *Rosc. Crim. Ev.* 399, 5th Ed.; also *R. v. Blake*, 6 Q. B. 126; *R. v. Esdaile*, 1 Fost. & F. 213.

² 3 Gr. Russ. 161, 4th Ed. See also *Phill. & Am. Ev.* 210, 434; *Tayl. Ev.* §§ 527-532, 4th Ed.

one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be *admitted as evidence to affect them on their trial, for the same offense. And, in general, [* 643] proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one, in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others." And this is in accordance with the law in other cases; for if several persons go out with the common design of committing an unlawful act, any thing done by one of them in prosecution of that design, though not in presence of his fellows, is in law the act of them all.¹

*Instances illustrative of the rule "res inter alios acta," &c.
—Indicative evidence.*

§ 509. The rule "*res inter alios acta alteri nocere non debet*" is so elementary in its nature that a few instances will suffice for its illustration.² Sir Edward Coke gives the following:—"If a man make a lease for life, and then grant the reversion for life, and the lessee

¹ 1 Hale, P. C. 462 *et seq.*; Fost. C. L. 349-350, 353-354; *R. v. Hodgson*, 1 Leach, C. L. 6; 4 Black. Com. 34.

² The reader desirous of more will find a large number collected in Wingate's *Maxims*, p. 327.

attorn, and after the lessor disseize the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornment in law of the grantee for life, because he doth no act, nor assent to any which might amount to an attornment in law. Et res inter alios acta," &c.¹ Where several persons are accused or suspected of a criminal offense,² or sued in a civil court,³ a confession * or admission by one [* 644] in the absence of his fellows is no evidence against them. So where, on an appeal of robbery against A., the jury acquitted the defendant, and found that B. and C. abetted the appellant to bring the false appeal: as B. and C. were strangers to the original, they were not concluded by this finding; "but," adds the report, "they shall be distrained ad respondendum,"⁴—a good instance of the value of res inter alios acta as *indicative*, however dangerous it would be as *legal*, evidence.

Exceptions to the rule.

§ 510. We have said that there are exceptions to this rule. Thus, although in general strangers are not bound by, and cannot take advantage of, estoppels, yet it is otherwise when the estoppel runs to the disability or legitimation of the person.⁵ So a judgment *in rem*, in the Exchequer, is conclusive against all the world:⁶ as also was a fine after the period of non-claim had elapsed.⁷ The admissibility in evidence of many documents of

¹ Co. Litt. 319 a.

² Kely. 18 ; 9 Ho. St. Tr. 23.

³ Godb. 326, pl. 418 ; *Hemmings v. Robinson*, 1 Barnes' Notes, 817.

⁴ Old record of Mich. 42 Edw. III. set out 12 Co. 125, 126.

⁵ *Infra*, ch. 7, sect. 2.

⁶ *Infra*, ch. 9.

⁷ 2 Blackst. Comm. 354.

a public and quasi public nature is at variance with this principle, which is then brought in collision with the maxim “omnia præsumuntur ritè esse acta:” and the number of them has been much increased by statute, especially in late years.¹ The following decided exception is also given by Littleton:²—“If there be lord mesne and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of twelve pence, if the lord paramount purchase the tenancy in fee, then the service of the mesnalty is extinct; because that when the lord paramount hath the tenancy, he holdeth of his lord next paramount to him, and if he should hold this of him which was mesne, then he *should hold the same tenancy immediately of divers lords by divers services, which should be [* 645] inconvenient, and the law will sooner suffer a mischief than an inconvenience, and therefore the seignory of the mesnalty is extinct.” On this Sir Edward Coke observes: “It is holden for an inconvenience, that any of the maxims of the law should be broken, though a private man suffer loss; for that by infringing of a maxim, not only a general prejudice to many, but in the end a public uncertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non debet, et factum unius alteri nocere non debet*; which are true with this exception, unless an inconvenience should follow.” And another old book lays down as maxims: “Privatum incommodum publico bono pensatur;”⁴ “Privatum commodum publico cedit.”⁵

¹ See bk. 1, pt. 2.

⁴ Jenk. Cent. 2, Cas. 65.

² Sect. 231.

⁵ Jenk. Cent. 5, Cas. 80.

³ Co. Litt. 152 b.

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* CHAPTER VI.

OPINION EVIDENCE.

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General rule — Opinion evidence not receivable.

§ 511. The use of witnesses being to inform the tribunal respecting *facts*, their *opinions* are not in general receivable as evidence.¹ This rule is necessary to prevent the other rules of evidence being practically nullified. Vain would it be for the law to constitute the jury the triers of disputed facts to reject derivative evidence when original proof is withheld, and to declare that a party is not to be prejudiced by the words or acts of others with whom he is unconnected, if tribunals might be swayed by opinions relative to those facts, expressed by persons who come before them in the character of witnesses. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury,

[* 647] *whom the law presumes to be at least as capable as the witnesses, of drawing from them any

¹ Peake, Evid. 195, 5th Ed.; Ph. & Am. Evid. 899; 1 Phill. Evid. 520, 10th Ed.; 1 Greenl. Evid. § 440, 7th Ed.; 3 Burr. 1918; 5 B. & Ad. 846, 847; and the authorities in the following notes.

inferences that justice may require. “*Testes rationem scientiæ reddere teneantur.*”¹ “*Les testm̃ doivent rien tesm̃ fors ceo que ils soient de certain, s. ceo que ils veront ou oyront.*”² “*Omne sacramentum debet esse certæ scientiæ.*”³ “It is no satisfaction for a witness to say that *he thinks*, or *persuadeth himself*, and this for two reasons: First. Because the judge is to give an absolute sentence, and for this ought to have a more sure ground than thinking; Secondly. The witness cannot be sued for perjury.”⁴

Meaning of the rule.

§ 512. This rule must not, however, be misunderstood;—nothing being farther from the design of the law than to exclude from the cognizance of the jury any thing which could legitimately assist them in forming a judgment on the facts in dispute;—its meaning is simply, that questions shall not be put to a witness which virtually put him in the place of the jury, by substituting his judgment for theirs. A good illustration of its real nature is afforded by the case of *Daines and another v. Hartley*.⁵ That was an action for slandering the plaintiffs in their trade. At the trial a witness deposed to the following words, as having been spoken by the defendant relative to some bills given by the plaintiffs to a firm of which the witness was member, “You must look out sharp that those bills are met by them.” The counsel for the plaintiffs then proposed to ask “What did you understand by that?” which question was ob-

¹ Heinec. ad Pand. pars. 4, § 144.

² Per Thorpe, C. J., 28 Ass. pl. 11.

³ 4 Inst. 279.

⁴ Dyer, 53 b, pl. 11, in marg. Ed. 1688.

⁵ 8 Exch. 200.

jected to, and disallowed by the judge. A rule for a new trial was afterward obtained, on the ground that the question was improperly rejected: which, after [* 648] *argument, was discharged: and the following judgment was delivered by Pollock, C. B., in the name of the court: "There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and, therefore, that it may mean directly the reverse of what it professes to mean. Something may have previously passed, which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant, as spoken of the plaintiff, is to ask the witness, not 'What did you understand by those words?' but 'Was there any thing to prevent those words from conveying the meaning which ordinarily they would convey?' because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question then may be put, 'What did you understand by them'? when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning. I believe we may say that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself, and without more, the understanding of a person

who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a foundation may be laid, by showing something else which has occurred; some other matter may be introduced, and then, when that has been done, the witness may be asked, *with reference to that other matter, what was the sense in which he understood the words. [* 649] But the mere question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question."

Exceptions to the rule — 1. Evidence of "experts" on questions of science, skill, trade, &c.

§ 513. The rule is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming a judgment on the facts as the witness, when circumstances rebut this presumption the rule naturally gives way — "*Cessante ratione legis cessat ipsa lex.*"¹ 1. On questions of science, skill, trade, and the like, persons conversant with the subject-matter — called by foreign jurists "experts," an expression now naturalized among us — are permitted to give their opinions in evidence. This rests on the maxim "*cuilibet in sua arte perito est credendum,*"² and the principle seems correctly stated by John W. Smith,³ that "the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judg-

¹ Co. Litt. 70 b.

² Co. Litt. 125 a; 4 Co. 29 a; *Calvin's case*, 7 Co. 19 a.

³ 1 Smith's Lead. Cas. 491, 5th Ed.

ment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it." A large number of instances of the application of this principle are to be found in the books. The opinions of medical men are constantly admitted as to the cause of disease or of death; or the consequence of wounds; or with respect to the sane or insane state of a person's mind, as collected from a number of circumstances; and on other subjects of professional skill.¹ But where *scientific men are [* 650] called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved.² Seal engravers may be called to give their opinion upon an impression, whether it was made from an original seal or from an impression; the opinion of an artist is evidence in an inquiry as to the genuineness of a picture; a ship-builder may give his opinion as to the seaworthiness of a ship; and where the question was, whether a bank, which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbor, the opinions of scientific engineers as to the effect of such an embankment upon the harbor were held admissible evidence.³ To these it may be added, that the opinions

¹ 1 Greenl. Ev. § 440, 7th Ed. The practice of resorting to this species of scientific evidence is by no means a modern invention. In the 28 Ass. pl. 5, on an appeal of mayhem, the defendant prayed that the court would see the wound to see if there had been a maiming or not. And the court did not know how to adjudge because the wound was new, and then the defendant took issue, and prayed the court that the mayhem might be examined; on which a writ was sent to the sheriff to cause to come "Medicos, chirurgicos de melioribus London. ad informandum dominum regem et curiam de his, quæ eis ex parte domini regis injungerentur." See, also, Plowd. 125.

² 1 Greenl. Ev. § 440, 7th Ed.; *M'Naghten's case*, 10 Cl. & F. 200.

³ 1 Greenl. Ev. § 440, 7th Ed.

of antiquaries have been received relative to the date of ancient handwriting;¹ and where, on an indictment for uttering a forged instrument, the question was whether a paper had originally contained certain pencil marks, which were alleged to have been rubbed out and writing substituted in their stead; the opinion of an engraver, who was in the habit of looking at minute lines on paper, and had examined the document with a mirror, was held receivable, although of no weight unless confirmed.²(a) It is on this principle that the evidence of professional or official persons is receivable as proof of foreign laws.³ From the very nature of the * subject, experts can only speak to their judgment or belief. [* 651]

¹ *Tracy Peerage case*, 10 Cl. & F. 154.

² *R. v. Williams*, 8 C. & P. 434.

³ *Tayl. Ev.* § 1280, 4th Ed.; *The Sussex Peerage case*, 11 Cl. & F. 85; *Earl Nelson v. Lord Bridport*, 8 Beav. 527; *The Baron de Bode's case*, 8 Q. B. 208; *Bristow v. Sequeville*, 5 Exch. 275; *Vander Donckt v. Thellusson*, 8 C. B. 812; *Perth Peerage case*, 2 Ho. Lo. Cas. 874.

(a) In Massachusetts the evidence of persons accustomed to examine handwriting is admissible to prove the genuineness of a signature. *Com. v. Williams*, 105 Mass. 62. Thus, in *Marcy v. Barnes*, 82 Mass. 161, it was held that a photographer, who is accustomed to examining handwriting in connection with his business to detect forgeries, is a competent witness to give an opinion as an expert, and that this opinion may be founded partly upon photographic copies made by himself, which are in evidence; but that, in order to make such copies admissible, they must be proved to be correct in all particulars, except coloring, and that this fact may be established by the evidence of the photographer. See, also, *State v. Clark*, 40 Vt. But, *contra*, see *Taylor Will Case*, 10 Abb. Pr. N. S. (N. Y.) 301, where it is held that such evidence can only come from one who is acquainted with the handwriting in question, and that photographic copies are not admissible as a basis of opinion as to the genuineness of a signature. See, also, *Tyler v. Todd*, 36 Conn. 218. So, to prove erasures and substitution of words, the evidence of persons familiar with the appearance of documents when erasures have been made may be used, and even the use of a microscope or any scientific test may be resorted to.

§ 514. But the weight due to this, as well as to every other, kind of evidence is to be determined by the tribunal, which should form its own judgment on the matters before it, and is not concluded by that of any witness, however highly qualified or respectable. Nor is this always an easy task, there being no evidence the value of which varies so immensely as that now under consideration, and respecting which it is so difficult to lay down any rules beforehand. Its most legitimate, valuable and wonderful application is on charges of poisoning, where poison is extracted from a corpse by means of chemical analysis.¹ "It is surely," says Dr. Beck,² "no mean effort of human skill to be brought to a dead body, disinterred perhaps after it has lain for months, or even years in the grave; to examine its morbid condition; to analyze the fluids contained in it (often in the smallest possible quantities); and from a course of deductions founded in the strictest logic, to pronounce an opinion, which combined circumstances, or the confession of the criminal, prove to be correct." "It is such duties, ably performed, that raise our profession to an exalted rank in the eyes of the world; that cause the vulgar, who are ever ready to exclaim against the inutility of medicine, to marvel at the mysterious power by which an atom of arsenic, mingled amidst a mass of confused ingesta, can still be detected. It does more: it impresses on the minds of assassins, who resort to poison, a salutary dread of the great impossibility of escaping discovery." "And [* 652] this, if properly done, must *be accomplished without listening to rumor and without permitting prejudice to operate. Many, again, by their re-

¹ *Suprà*, ch. 2, sect. 3, sub-sect. 2.

² Beck's Med. Jur. 1085, 7th Ed

searches, have saved the innocent, showing that accidental or natural causes have produced all the phenomena." It would not be easy to overrate the value of the evidence given in many difficult and delicate inquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art and trade. But as it is impossible to measure *à priori* the integrity of any witness, and equally so to determine the amount of skill which a person following a particular science, art or trade may possess, the tribunal is under the necessity of listening to all such persons when they present themselves as witnesses. Now, after making every allowance for the natural bias which witnesses usually feel in favor of causes in which they are engaged, and giving a wide latitude for *bonâ fide* opinions, however unfounded or fantastical, which persons may form on subjects necessarily depending much on conjecture, there can be no doubt that testimony is daily received in our courts as "scientific evidence," to which it is almost profanation to apply the term; as being revolting to common sense, and inconsistent with the commonest honesty on the part of those by whom it is given. In truth, witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury — an offense of which it is extremely difficult, indeed almost impossible, to convict a person who only swears to his belief, particularly when that belief relates to scientific matters.¹ On the other hand, however,

¹ Bonnier, in his *Traité des Preuves*, after quoting the 64th Novel, which abundantly shows that these malpractices were well understood in ancient Rome, sarcastically adds, "On voit que les complaisances de l'expertise ne datent pas de nos jours." § 68. He likewise forcibly observes, § 67, "L'ex-

[* 653] *mistakes have occasionally arisen from not attaching sufficient weight to scientific testimony. This arises chiefly where the knowledge of the tribunal and society in general are very much in arrear of the scientific knowledge of the witness. One remarkable instance is cited by a modern author on the law of evidence. In the infancy of traveling by steam on land, a civil engineer of high reputation having deposed, before a Parliamentary committee, that steam-carriages might very possibly be expected to travel on railroads at the rate of *ten* miles an hour, the interrogating counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of the evidence he had previously given was much impaired.¹

Experts in French law.

§ 515. In France, experts are officially delegated by the court to inquire into facts and report upon them, and they stand on a much higher footing than either ordinary or scientific witnesses among us. Yet even there it is a maxim "*Dictum expertorum nunquam transit in rem judicatam.*"² Our own law, in its desire to vindicate the unquestionably sound principle that judicial and inquisitorial functions ought to be kept distinct, appears to have scarcely armed its courts with sufficient powers to compel the production of evidence—the instances in which they proceed *ex officio* to obtain it are few; and this case of

pertise n'est qu'un verre qui grossit les objets; et c'est au juge, qui a la faculté de s'en servir, à examiner en toute liberté si les images qu'elle lui présente sont bien nettes."

¹ Gresley, Ev. in Eq. 369. Stephenson's evidence, before the committee on the Liverpool and Manchester Railway Bill, was received with equal incredulity. See Smiles' Life of Stephenson, *in loc.*

² Bonnier, Traité des Preuves, § 74.

experts seems one in which such a power might be vested in them with advantage, concurrently of course with the right of litigant parties to produce skilled witnesses of their own. Great steps in this direction have been taken by the legislature in the 22 & 23 Vict. c. 63, and 24 Vict. c. 11: by the * former of which courts of justice in one part of the Queen's dominions are empowered, in certain proceedings, to remit a case for the opinion of a court of justice in any other part thereof, on any point on which the law of that other part is different from that in which the court is situate; and the latter empowers them to remit a case with queries to the tribunals of foreign countries for ascertaining the law of those countries.

Scientific evidence received with too little discrimination.

§ 516. So far as medical evidence is concerned, medical jurists complain that there is too little discrimination exercised in receiving all who are called *doctors* as witnesses. "In England," says an able authority already quoted,¹ "not only physicians, surgeons and apothecaries beyond whom it should not be extended, but hospital dressers, students and quacks have been permitted to act as medical witnesses. 'We could point out a case of poisoning,' say the editors of the Edinburgh Medical and Surgical Journal, 'where the most essential part of the evidence depended on the testimony of a quack alone, and it was admitted.'" But, to answer these authors in their own language, the remedy they prescribe is worse than the disease. Must the judge, before receiving the testimony of a man who makes profession of the healing art, institute a preliminary inquiry as to whether he comes

¹ Beck's Med. Jurisp. 1091, 7th Ed.

within the definition of a “quack?”—one of the most uncertain words in the language, and the correctness of the application of which to particular individuals must ever, to a certain extent, be matter of opinion. Besides, it would be at variance with the free spirit of our laws to place the lives and liberties of all persons accused of offenses in the hands of a privileged class, by prohibiting them from availing themselves of the [* 655] *testimony of others who have studied and practiced the subject in question. Still it must be conceded that our practice is much too loose in this respect—that when medical or other scientific witnesses are offered, our judges and jurymen do not inquire sufficiently into the *causa scientiæ*—the means which they have had of forming a judgment. To say nothing of those palpable cases where the course of study has been so short, or the experience so limited, that the judge ought to reject the witness altogether, or of those where, though the evidence must be received, it is clear that little confidence ought to be reposed in the opinion given, it often happens that even men distinguished in one branch of a science or profession have but a superficial knowledge of its other branches. The most able physician or surgeon may know comparatively little of the mode of detecting poisons, or of other intricate branches of medical jurisprudence; so that a chemist or physiologist, immeasurably his inferior in every other respect, might prove a much more valuable witness in a case where that sort of knowledge is required.¹

¹ The celebrated John Hunter, the great anatomist, who was examined as a witness in the important case of *Donellan*, indicted for having poisoned his brother-in-law, used to express his regret publicly in his lectures that he had not given more attention to the subject of poisons, before venturing to give an

Opinions founded on complex facts which cannot easily be brought before the tribunal.

§ 517. 2. Another class of exceptions is to be found, where the judgment or opinion of a witness, on some question material to be considered by the tribunal, is formed on complex facts which from their nature it would be impossible to bring before it. Thus, the identification by a witness of a person or thing is necessarily an exercise of his judgment. "In the identification of person," says Parke, B.,¹ "you compare in *your mind the man you have seen with the man you see at the trial. The same rule belongs [* 656] to every species of identification." And on the same occasion Alderson, B., said: "Generally, wherever there is such a coincidence in admitted facts as makes it more reasonable to conclude that a certain subject-matter is one thing rather than another, that coincidence may be laid before the jury to guide their judgment in deciding on the probability of that fact." Many mistakes, however, have been made in the identification both of persons and of things.² So the state of an unproducibile por-

opinion in a court of justice. Sir Astley Cooper, as quoted in Beck's Med. Jur. 1089, 7th Ed.

¹ *Fryer v. Gathercole*, 13 Jur. 542.

² The resemblance between individuals is often very close. A well-known man of fashion once narrowly escaped conviction for a highway robbery, from his extraordinary resemblance to a notorious highwayman of the day (Beck's Med. Jur. 408, 7th Ed.); and Sir Thomas Davenport, an eminent barrister, swore positively to the persons of two men, whom he charged with robbing him and his lady in the open daylight. A clear alibi was, however, proved, and the real robbers being afterward taken into custody with the stolen property upon them, Sir Thomas, on seeing them, at once acknowledged that he had been mistaken. (Per MacNally, *arguendo*, in *R. v. Byrne*, 28 Ho. St. Tr. 819.) For other cases of mistaken identity of persons, see Wills, Circ. Evid. 90 *et seq.*, 3rd Ed.; Beck's Med. Jurisp. 404 *et seq.*, 7th Ed.; the case of *James*

tion of real evidence — as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository — may be explained by a term expressing a complex idea; *e. g.*, that it looked old, decayed or fresh, was in good or bad condition, &c.¹ So, also, may the emotions or [* 657] *feelings of a party whose psychological condition is in question — thus a witness may state as to whether on a certain occasion he looked pleased, excited, confused, agitated, frightened; or the like.² To this head also belong the proof of handwriting *ex visu scriptiōnis* and *ex scriptis olim visis*.³ And it is on this principle that testimony to character is received; as where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that from the general character of another witness he ought not to be believed on his oath.⁴ In all cases, of course, the grounds on which the judgment of the witness is formed may be inquired into on cross-examination. (a)

Crow, Theor. of Pres. Proof, Append. Case 4, and that of *Male*, 3 Benth. Jud. Ev. 255, and Dicks. Law Ev. in Scotl. 153, note (d), and 154, note (a). In *Shuffbottom v. Allday*, Exch. M. 1856, M. S., Alderson, B., mentioned a case which occurred at Liverpool some years before, where a prisoner was identified by six or seven respectable witnesses; but their evidence was encountered by that of the jailer and all the officers of the prison, who deposed that at the time in question he was there in their custody. A good instance of mistaken identity of *things*, taken from Burnett's Crim. Law of Scotland, p. 558, will be found in 19 Ho. St. Tr. 494 (note).

¹ *Leighton v. Leighton*, 1 Str. 240.

² *Suprà*, ch. 2, sect. 3, sub-sect. 3

³ Bk. 2, pt. 3, ch. 2.

⁴ *Suprà*, pt. 1, ch. 1.

(a) It may be stated as a *general* rule that opinion evidence, or the evidence of experts, is never admissible on subjects of general knowledge, with which jurors are presumed to be acquainted; *Concord R. R. Co. v. Greeley*, 23 N. H. 237; *Sackett v. Spencer*, 29 Barb. (N. Y.) 180; *Ogden v. Pearsons*, 23 How

Self-regarding evidence.

*§ 518. In the preceding chapters we have shown the general nature of those rules, by [* 659] which evidence is rejected for want either of originality or of proximity. The present will be devoted to that species of evidence for or against a party, which is afforded by the language or demeanor of himself, or of those whom he represents, or of those who represent him. All such we purpose to designate by the expression "Self-regarding evidence." When in favor of the party supplying it, the evidence may be said to be "Self-serving;" when otherwise, "Self-disserving."¹

General rule.

§ 519. The rule of law with respect to self-regarding evidence is, that when in the *self-serving* form it is not in general receivable; but that in the *self-disserving* form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind.² For, although, when viewed independently of jurisprudence, it would be difficult to maintain that the declarations, or what is equivalent to the declarations, of one man may not in particular cases have some probative force as evidence against another, our law rejects them,³ in obedience to its great principle which requires judicial evidence to be proximate, and also from the peculiar temptations to fraud and fabrication which the allowing such evidence

¹ These three terms are taken from Benth. Jud. Ev. vol. 5, p. 204. The term "Self-regarding" and its two species are also applicable to the statements and demeanor of *witnesses*.

² Gilb. Evid. 119, 4th Ed.; Finch, Law, 37; Trials per Pais, 381. See acc. Mascard. de Prob. Quæst. 7, N. 10.

³ 2 Campb. 389, and *suprà*, bk. 1, pt. 1, § 91.

would so obviously supply. This is a branch of the general rule that a man shall not be allowed to make evidence for himself.¹ But, on the other hand, the universal experience of mankind testifies that, as men consult their own interest, and seek their own advantage, whatever they say or admit against their * interest [* 660] or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears.(a)

¹ 3 B. & A. 144. See *suprà*, ch. 5, § 506.

(a) Admissions, or statements by a party in interest in an action, made at a time when his interest in the subject-matter of the action existed, may be given in evidence against him or those deriving title through him, even though he is present in court and could be called as a witness; *Holt v. Walker*, 26 Me. 107; *Hovey v. Stevens*, 1 W. & M. (U. S.) 290; *Jones v. Brownfield*, 2 Barr (Penn.), 55; *Sailor v. Hertzogg*, id. 182; *Pierce v. McKeenan*, 3 id. 136; *Hill v. Powers*, 16 Vt. 516; *Pike v. Wiggin*, 8 N. H. 356; *Goodnow v. Parsons*, 36 Vt. 46; although it relates to the contents of a writing; *Smith v. Palmer*, 6 Cush. (Mass.) 513; *Loomis v. Wadham*, 8 Gray (Mass.), 557; *State v. Littlefield*, 3 R. I. 124; but the force to be given to such evidence is necessarily dependent upon the circumstances of each case, and it may be the weakest, or it may be the strongest evidence, according to the circumstances under which they were made, and all the facts surrounding the transaction. *Parker v. McNiel*, 12 S. & M. (Ky.) 355. They should be scanned with great care; *Ray v. Bell*, 24 Ill. 444; *Higgs v. Wilson*, 3 Metc. (Mass.) 327; *Witbeck v. Keffer*, 31 Ala. 199; *Ector v. Welsh*, 29 Ga. 443; *Durkee v. Stringham*, 8 Wis. 1; and in view of attendant circumstances; *Parker v. McNiel*, 20 Miss. 355; and where the admissions are made by one who is deceased and cannot be called to contradict the witness swearing to them, the evidence is of the weakest character, and is entitled to no weight unless sustained by other evidence or by circumstances that directly point to its truth; *Wilson v. Franklin*, 10 La. Ann. 279; *Dupre v. McCright*, 6 id. 146; and admissions claimed to have been made in loose and casual conversation are held to be the weakest species of evidence and entitled to little weight; *Vaughn v. Haun*, 6 B. Monr. (Ky.) 338; *Printup v. Mitchell*, 17 Ga. 558; *Clark v. Martin*, 9 Iowa, 391; *Horner v. Speed*, 2 Patt. & H. (Va.) 616; or of law; *Solomon v. Solomon*, 2 Kelley (Ga.), 18; or hastily and inconsiderately; *Martin v. Peters*, 4 Robt. (N. Y.) 434; *Stewart v. Connor*, 13 Ala. 94; or it may be shown that they are not true in point of fact; and where even a party has admitted that a certain transaction was fraudulent, such admission is entitled to but little weight where the circumstances tend to show

Self-serving evidence.

§ 520. The subject of *self-serving* evidence may therefore be dispatched in a few words, and indeed has been substantially considered under the title "*res inter alios*

that it was in point of fact *bona fide*. *Rice v. R. R. Co.*, 7 Humph. (Tenn.) 39; *Young v. Foote*, 43 Ill. 33; *Pecker v. Hoyt*, 15 N. H. 145; *Ray v. Bell*, 24 Ill. 444; *Patrick v. Hazen*, 10 Vt. 183; even though made under oath. *Hotaling v. Kilderhouse*, 1 Park. Cr. (N. Y.) 241. Thus in *Garrison v. Aikin*, 2 Barb. (N. Y.) 25, which was a bill in equity to set aside a bond of indemnity which the plaintiff claimed he had fraudulently been induced to sign, the bond was for \$5,000, and the plaintiff signed it as surety for his brother. The plaintiff claimed that when his brother asked him to sign the bond, he told him that it was only for \$500, and that when the defendant read the bond to him, he read it as being for that sum. Evidence was admitted that one of the defendants admitted that the plaintiff was made to believe that the bond was only for \$500. *Harris, J.*, in commenting upon the weight to be given to such evidence, said: "There have been but few judges or elementary writers who have not had occasion to speak of the character of this kind of evidence; such is the facility with which it may be fabricated, and such is the difficulty of disproving it if false. It is so easy, too, by the slightest mistake or failure of recollection, totally to pervert the meaning of the party and change the effect of his declaration, that all experience has proved it to be the most dangerous kind of evidence, always to be received with great caution, unless sustained by corroborating circumstances." In that case the bill was dismissed notwithstanding the admission of one of the defendants, the other circumstances not sustaining the allegation of fraud. Verbal admissions should always be weighed in view of the circumstances under which they were made, and have force only in accordance with those circumstances. Admissions deliberately made are entitled to weight, but admissions made hastily or inadvertently, however clearly established, are entitled to little, if any, consideration. The jury are to judge of their weight. *Garrett v. Garrett*, 27 Ala. 687. Admissions are never conclusive except when they operate as an estoppel *in pais*; *Jones v. State*, 13 Tex. 168; thus a receipt is regarded as an admission by the party making it, of the truth of all it contains; and, while it is not *conclusive* between the parties, yet, if third persons have acted upon the faith of it, it is conclusive so far as their interests are concerned. Thus, when A has sold property to B conditionally, the title to remain in A until fully paid for, a receipt in full given by A to B, even though given under a mistake in fact, and although not conclusive between A and B, is nevertheless conclusive between A and C, who has purchased the property of B, relying upon the discharge of A's lien as expressed in the receipt, and A is estopped from asserting his title to the property. *Bank v. Sollee*, 2 Strobb. (S. C.) 390. An admission made under oath

acta alteri nocere non debet.”¹ There are, however, some exceptions to the rule excluding it. The first is, that where part of a document or statement is used as

¹ *Suprà*, ch. 5.

is not conclusive, but may be explained or shown to be a mistake; *Hotaling v. Kilderhouse*, 1 Park. Cr. (N. Y.) 241; *Carter v. Bennett*, 4 Fla. 283; *Stewart v. Connor*, 13 Ala. 94; but admissions made by a vendor, that a sale of property made by him was fraudulent, are not admissible against the vendee, unless it is shown that he had notice of the admissions, particularly when the transaction in all other respects is free from objection; *Farmers' Bank v. Douglass*, 11 S. & M. (Miss.) 469; and admissions made subsequently to the time when the person making them parted with his interest, are never admissible; *Hansa v. Curtis*, 1 Barb. Ch. (N. Y.) 263; *Brown v. McGraw*, 12 S. & M. (Miss.) 267; *Merriweather v. Herron*, 8 B. Monr. (Ky.) 162; *Guttiif v. Rose*, id. 629; except to contradict his evidence; *Dillon v. Choteau*, 7 Mo. 386; and whether a party to a suit is a *real* or only a *nominal* party is a question of fact for the jury; *Campbell v. Day*, 16 Vt. 558; or before he acquired an interest therein; *Dent v. Dent*, 3 Gill (Md.), 482; and an admission may be shown to have been made under duress. *Foss v. Hildreth*, 10 Allen (Mass.), 76; *Tilly v. Damon*, 11 Cush. (Mass.) 247. The general rule is, that admissions of a person not a party to the record are not admissible in evidence, unless at the time when the declarations or admissions were made he had an interest in the subject-matter of the action to which the admissions relate; *Forsaith v. Stickney*, 16 N. H. 575; *Bain v. Clark*, 39 Mo. 252; *Thurmond v. Trammell*, 22 Tex. 257; *Braintree v. Hingham*, 1 Pick. (Mass.) 245; in order to be admissible against third persons who have subsequently acquired his interest, they must be of such a character that they would have been admissible against the party making them. *Ten Eyck v. Runk*, 26 N. J. 513; *Snelgrave v. Martin*, 2 McCord (S. C.), 241.

An admission made by one in a pleading; *Lacoste v. Sellick*, 1 La. Ann. 336; *Stuart v. Kissam*, 2 Barb. (N. Y.) 493; or a deed or other instrument in writing may be given in evidence against him or his privies in interest; but not if the pleading was never filed or the writing delivered; *Robinson v. Cushman*, 2 Denio (N. Y.), 149; and a *part* of an admission cannot be given and the rest be rejected. If a party seeks to avail himself of it he must take the whole admission; *Stuart v. Kissam*, *ante*; *Mattocks v. Lyman*, 18 Vt. 98. *Wilson v. Calvert*, 8 Ala. 757; *Bradford v. Bush*, 10 id. 386; *Storer v. Gowan*, 18 Me. 174; *Reas v. Hardy*, 7 Mo. 348; *Overman v. Cobb*, 17 Ired. (N. C.) 1; *Credit v. Brown*, 10 Johns. (N. Y.) 365; *Bristol v. Warner*, 19 Conn. 7; *Taylor v. Whiting*, 2 B. Monr. (Ky.) 268; *O'Brien v. Cheney*, 5 Cush. (Mass.) 148; *Turner v. Jenkins*, 1 H. & J. (Md.) 161; *Fitzpatrick v. Harris*, 8 Ala. 32; *Ward v. Winston*, 20 id. 167; *Kammell v. Bassett*, 24 Ark. 499; *Develin v. Gilcrease*, 2 McMull. (S. C.) 425; *Morris v. Stokes*, 21 Ga. 552; *Brown's Case*, 9 Leigh (Va.), 633; *Coon v. State*, 21 Miss. 246; *Williams v. Keyser*, 1 Fla. 234; *Mays v. Denver*, 1 Iowa, 216;

self-disserving evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider, and attach what weight they see fit to any

but the jury are not bound to give equal credit to the entire admissions. They may believe a part and reject a part. *Barnes v. Allen*, 2 Abb. (N. Y.) 311; *Searles v. Thompson*, 18 Minn. 316; *Field v. Hitchcock*, 17 Pick. (Mass.) 182; *Licett v. State*, 23 Ga. 57; *Mattocks v. Lyman*, 18 Vt. 98; *Coon v. State*, 21 Miss. 246. So an admission may be proved although the witness did not hear all of it. He may swear to what he did hear of it; *Westmoreland v. State*, 45 Ga. 225; *Williams v. Keyser*, 11 Fla. 234; *State v. Covington*, 2 Bailey (S. C.), 569; and is limited to what was said at the time; *People v. Green*, 1 Park. Cr. (N. Y.) 11; *Hatch v. Potter*, 3 Ill. 725; and does not apply to what was said by him at a subsequent interview; *Adams v. Comes*, 107 Mass. 275; and he cannot rebut the presumptions arising from such admissions by showing what was said by him at a subsequent interview; *Snowden v. Pope*, Rice (S. C.), 174; *Hunt v. Roylance*, 11 Cush. (Mass.) 117; *Lee v. Hamilton*, 3 Ala. 529; *Clark v. Haffagher*, 26 Mo. 264; *McPeake v. Hutchinson*, 5 Serg. & R. (Penn.) 295; thus it has been held that when a party presents his account to his debtor, upon which both debit and credit is entered, the debtor cannot claim the benefit of the credits without also submitting to the debits. *Fitzpatrick v. Harris*, 8 Ala. 32.

Declarations of a grantor of land, made shortly before and after a sale, though not made in the presence of the vendee, are admissible to establish fraud in the grantor, but not to establish fraud on the part of the grantee; *Nevin v. Voorhees*, 14 La. Ann. 738; *Venable v. Bank of U. S.*, 2 Pet. (U. S.) 107; unless the grantee is made cognizant of the fraud by proof beyond such admissions; *Bank v. Douglass*, 32 Miss. 469; *Ervine v. Gray*, 12 Md. 64; *Alexander v. Gould*, 1 Mass. 165; *Bridge v. Eggleston*, 14 id. 245; *Payne v. Craft*, 7 W. & S. (Penn.) 458; *Robinson v. Petzer*, 3 W. Va. 335; *De France v. Howard*, 4 Iowa, 524; *Tibbitts v. Jacobs*, 31 Conn. 428; *Bogert v. Phelps*, 14 Wis. 88; *Ellis v. Howard*, 17 Vt. 330; and the same is equally true in relation to the admissions or declarations of a vendor or assignor of personal property after he has parted with his interest therein; *Ellis v. Howard*, *ante*; *Dennison v. Bennet*, 41 Me. 332; *Page v. O'Niel*, 12 Cal. 483; *Shaw v. Robinson*, 12 Minn. 445; *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Peck v. Crouse*, 46 Barb. (N. Y.) 151; *Wynn v. Gledwell*, 17 Ind. 446; *James v. Kirby*, 29 Ga. 684; *Horrigan v. Wright*, 4 Allen (Mass.), 514; *Bartlett v. Marshall*, 2 Bibb (Ky.), 470; *Mobly v. Barnes*, 26 Ala. 718; *Clinton v. Estes*, 20 Ark. 216; *Carlton v. Baldwin*, 27 Tex. 572; *Wheeler v. McCarriston*, 24 Ill. 40; *Holmark v. Malin*, 5 Cold. (Tenn.) 482; *Gray v. Earl*, 13 Iowa, 188; unless they accord with the admissions of the vendee. *Hunter v. Jones*, 6 Rand. (Va.) 541. Not only what is said by a party, but also what is done by him, may be given in evidence as an admission. Verbal admissions are treated as express, while those arising from a previous conduct are implied admissions, and, while entitled to equal weight with the former, yet they may be explained by evidence that the party was laboring under a

self-serving statements it contains.¹ This exception is founded on the plain principle of justice that, by using a man's statement against him, you adopt that

¹ Tayl. Ev. § 655, 4th Ed.; Peake, Ev. 16, 5th Ed.; 2 Ev. Poth. 156-158; *Randle v. Blackburn*, 5 Taunt. 245; *Thomson v. Austen*, 2 D. & Ryl. 358; *Smith v. Blandy*, Ry. & M. 257; *Darby v. Ouseley*, 2 Jur., N. S. 497.

mistake of facts; *Stewart v. Connor*, 13 Ala. 94; or of law as to his legal rights. *Hays v. Cage*, 2 Tex. 501; *Marlborough v. Sisson*, 23 Conn. 44; *Bowen v. King*, 25 Penn. St. 409; *Solomon v. Solomon*, 2 Ga. 18. The test of the admissibility of admissions made by a party, or one from whom he has derived title, is dependent upon the fact whether they afford any presumptions against him material to the issue. *Goodnow v. Parsons*, 36 Vt. 46; *State v. Littlefield*, 3 R. I. 128; *Tenney v. Evans*, 14 N. H. 343; *Marvin v. Richmond*, 3 Den. (N. Y.) 58; *McGill v. Ash*, 7 Penn. St. 297; *Jones v. Morgan*, 13 Ga. 515; *Phelan v. Bonham*, 9 Ark. 389; or affect the credibility of the evidence of the person making them, or mitigate the damages in a proper case. *Green v. Gould*, 3 Allen (Mass.), 465. Admissions made with a view to a compromise are not admissible; *Batchelder v. Batchelder*, 2 Allen, 105; *Ferry v. Taylor*, 33 Mo. 323; *Perkins v. Concord R. R. Co.*, 44 N. H. 223; *Reynolds v. Manning*, 15 Md. 510; *Williams v. Thorpe*, 8 Cow. (N. Y.) 201; *State v. Dutton*, 11 Wis. 371; except where the admission is made because it is a fact, and of this the jury are to judge. *Hamblett v. Hamblett*, 6 N. H. 333. A person's silence, when a statement is made in his presence by the other party calling for a reply, may be treated as an admission of its truth in some cases, and is admissible in evidence; *Corser v. Paul*, 4 N. H. 24; *Black v. Hicks*, 27 Ga. 522; *Wells v. Drayton*, 1 Mill (S. C.), 111; but in order to entitle the party's silence to be treated as an admission, the statement must be such as would naturally call for a reply, and he must be in such a situation that he would probably have replied to it; *Brainard v. Buck*, 25 Vt. 573; *Lawson v. State*, 20 Ala. 65; *Wilkins v. Stidger*, 22 Cal. 231; *Rolfe v. Rolfe*, 10 Ga. 143; and he must have been so situated in reference to the subject-matter that an express admission made by him would have been admissible against the party against whom it is offered; *McGregor v. Wait*, 10 Gray (Mass.), 72; and this silence is extended to letters calling for a reply, and this class of admissions is subject to the same rules in this respect as oral admissions. *Fenno v. Weston*, 31 Vt. 345. So where a vendor of property refers a purchaser to third persons for information in regard to the property, he is bound by their statements the same as though made by himself; *Chapman v. Twitchell*, 37 Me. 59; *Bedell v. Com. Ins. Co.*, 3 Bosw. (N. Y.) 147; *Chadsey v. Green*, 25 Conn. 562; *Shaw v. Stone*, 1 Cush. (Mass.) 228; but in order to be admissible, they must relate strictly to the subject relative to which reference was made to them. *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561. Admissions made by a former owner of real estate, since deceased, against his title, are admissible against those claiming under him;

statement, as *evidence* at least. The civilians seem to have gone farther. "Observe," says Pothier,¹ "that when I have no other proof than your confession, I

¹ 1 Ev. Poth. § 799.

Van Blarcom v. Kip, 26 N. J. 357; Baker v. Haskell, 47 N. H. 479; Blake v. Everett, 1 Allen (Mass.), 248; Arthur v. Gale, 38 Ala. 259; Rogers v. Moore, 10 Conn. 13; Keener v. Kauffman, 16 Md. 296; Denton v. Perry, 5 Vt. 382; Jacks v. Hallan, 14 B. Monr. (Ky.) 133; but not after he has parted with his interest; Howland v. Fuller, 8 Minn. 50; Padgett v. Lawrence, 10 Paige's Ch. (N. Y.) 170; Gill v. Strozier, 32 Ga. 688; Thompson v. Huring, 27 Tex. 282; Dunwey v. School Commissioners, 40 Ill. 247; impeaching a deed previously made by him; Vroom v. King, 36 N. Y. 477; Brackett v. Wait, 6 Vt. 411; Merrill v. Dawson, 1 Hempst. (Tenn.) 563; Cavin v. Smith, 24 Mo. 221; Price v. Branch Bank, 17 Ala. 374; Ferguson v. Stover, 33 Penn. St. 411; Tyler v. Mather, 9 Gray (Mass.), 177; Burt v. McKinstry, 4 Minn. 204; Nichols v. Hotchkiss, 2 Day (Conn.), 121; Steward v. Thomas, 35 Mo. 203; Cohn v. Mulford, 15 Cal. 50; Hun v. Soper, 6 H. & J. (Md.) 276; Christopher v. Carrington, 2 B. Monr. (Ky.) 357; Myers v. McKenzie, 26 Ill. 36; Gullett v. Lamberton, 6 Ark. 107; nor to establish his title to land of which he was in possession when the declaration was made. Newell v. Horn, 47 N. H. 379; Ware v. Brookhouse, 7 Gray (Mass.), 454; Watson v. Bissell, 27 Mo. 220; Keator v. Dimmick, 46 Barb. (N. Y.) 158. But the declarations of a former owner of land, since deceased, made after he has parted with his estate, in reference to the boundaries of the land, are admissible where they do not contradict or impeach, but serve to explain the conveyance; Dawson v. Mills, 32 Penn. St. 302; and the declarations of such former owner or his admissions made in former deeds, articles of agreement, etc., while owner, as to the lines and boundaries of the land, may be such as to be conclusive upon him and his grantors as an *estoppel in pais*; Gratz v. Beates, 45 Penn. St. 495; Daggett v. Shaw, 5 Metc. (Mass.) 223; Davis v. Jones, 3 Head. (Tenn.) 603; but declarations or admissions of the vendor, made *before* the sale or assignment, are admissible in an action against the vendee or those claiming under him; McLanathan v. Patten, 39 Me. 142; Sand v. See, 2 Rich. (S. C.) 168; Bowie v. Hunter, 4 Cranch (C. C. U. S.), 699; Heywood v. Reed, 4 Gray (Mass.), 574; Gallagher v. Wilkinson, 23 Cal. 331; Brown v. McGraw, 20 Miss. 267. So where a fraudulent combination between the vendor and vendee is shown, the declarations of the assignor or vendor made *after* the sale are admissible. O'Niel v. Glover, 5 Gray (Mass.), 144; Cuyler v. McCarty, 33 Barb. (N. Y.) 165; or if he remained in possession of the property *after* the sale and the declarations or admissions were made while he was in possession. Adams v. Davidson, 10 N. Y. 307.

Where several persons are associated together for a common object, as a crime, the admissions of one are evidence against all, when they are a part of the *res gestæ*, but not otherwise; State v. Thibreau, 30 Vt. 1; Moers v. Martin,

cannot divide it. Suppose, for instance, that I claim from you 200 livres, which I allege that you have borrowed, and of which I demand the payment; you admit

8 Abb. Pr. (N. Y.) 267; *Lincoln v. Claffin*, 7 Wall. (U. S.) 132; *People v. Pitcher*, 15 Mich. 397; *Glory v. State*, 13 Ark. 236; *State v. Myers*, 19 Iowa, 517; *State v. Ross*, 29 Mo. 32; *Com. v. Brown*, 14 Gray (Mass.), 419; *U. S. v. Johnston*, 1 Cranch (U. S. C. C.), 237; *State v. George*, 7 Ired. (N. C.) 321; that is, when they are made in furtherance of the common design, and in the progress and in the prosecution of the common purpose; *Lee v. Lamprey*, 43 N. H. 13; *State v. George, ante*; *Kimmell v. Geeting*, 2 Grant (Penn.), 125; or to accomplish a fraud; *Scott v. Baker*, 37 Penn. St. 330; *Jenne v. Joslyn*, 41 Vt. 478; *Apthorp v. Comstock*, 2 Paige's Ch. (N. Y.) 482; *Patten v. Freeman*, 1 N. J. 113; and before such evidence can be received the common design must be proved as a fact; *Jones v. Hurlburt*, 39 Barb. (N. Y.) 403; *State v. George, ante*; and proof of a collusion; *Ferguson v. Reeve*, 16 N. J. 193; or a division of spoils or of the profits, *Kimmell v. Geeting*, 2 Grant (Penn.), 135, is sufficient to let in such admissions. But admissions made *after* the common design has been accomplished are only admissible against the person making them. *Beauford v. Tanner*, 40 Penn. St. 9. Thus, the confession of one jointly indicted with another is admissible only against the one making it; *Hudson v. Com.*, 2 Duv. (Ky.) 531; *Com. v. Ingraham*, 7 Gray (Mass.), 46; *Browning v. State*, 30 Miss. 656; *U. S. v. Douglass*, 2 Blatch. (U. S.) 207; nor are the admissions of one plaintiff or defendant evidence against his co-defendant; *Sodusky v. McGee*, 7 J. J. Marsh. (Ky.) 266; *Lenhart v. Allen*, 32 Penn. St. 312; unless they are jointly interested in the subject-matter of the action; *Hurst v. Robinson*, 13 Mo. 82; *Inly v. Brigham*, 9 Humph. (Tenn.) 750; and an interest in the costs is sufficient; *Hamblett v. Hamblett*, 6 N. H. 333; or an *interest*, however small; *Walling v. Roosevelt*, 16 N. J. 41; *Pringle v. Chambers*, 1 Abb. Pr. (N. Y.) 58; but when a defendant does not appear or answer in the action his admissions are not admissible against one who does, unless made in the presence of such defendant; *Peck v. Yorks*, 47 Barb. (N. Y.) 131; but are competent against himself; *Spencer v. Campbell*, 9 W. & S. (Penn.) 92. In an action against several joint makers of a note the admissions of one are admissible against all, unless it is shown that their interest is not joint; *prima facie*, the presumption is that it is joint. *Barrick v. Austin*, 21 Barb. (N. Y.) 241; *Camp v. Dill*, 27 Ala. 553; *Bound v. Lathrop*, 4 Conn. 336.

The admissions of a payee of a note, made while he is the owner thereof, are not *generally* admissible against his assignee, who takes the note before maturity, for value; *Washburn v. Ramsdell*, 17 Vt. 299; *Stoner v. Ellis*, 6 Ind. 152; *Clark v. Peabody*, 21 Me. 500; *Perry v. Graves*, 12 Ala. 246; *Osborn v. Robbins*, 37 Barb. (N. Y.) 481; *Crayton v. Collins*, 2 McCord (S. C.), 257; *Beach v. Wise*, 1 Hill (N. Y.), 612; *Robb v. Schmidt*, 35 Mo. 290; as to impeach the consideration; *Stoner v. Ellis, ante*; *Drennan v. Smith*, 3 Head (Tenn.), 389; or in the case of a bill of exchange the declaration of the drawee that he had

the loan, but add that you have repaid it; I cannot found a proof of the loan upon your confession, which is, at the same time, a proof of payment; for I can only use it against you such as it is, and taking it altogether: *Si quis confessionem adversam allegat, vel depositionem testis, dictam cum suâ quantitate approbare tenetur.*" This was probably just enough under their judicial system; but with us, while the whole statement must be received, the credit due to each part must be determined by the jury, who may believe the self-serving *and disbelieve the self-disserving portion of it, or vice versâ. Again, a person on his trial [* 661] may, at least if not defended by counsel, state matters in his defense which are not already in evidence, and which he is not in a condition to prove, and the jury may act on that statement if they deem it worthy of credit.¹ Care must likewise be taken not to confound self-serving evidence with *res gestæ*. The language of a party accompanying an act which is evidence in itself may form part of the *res gestæ*, and be receivable as such.

¹ See bk. 4, pt. 1.

no funds when the bill was presented for acceptance; *Carle v. White*, 9 Me. 104; nor to vary or contradict the terms of the indorsement; *Sanborn v. Southard*, 25 Me. 409; or to prove demand of payment as a substantial fact; *Tower v. Darell*, 9 Mass. 332; but where the note is not indorsed until it is over-due, admissions or declarations of the indorser against his interest are admissible against his assignee; *Blount v. Riley*, 3 Ind. 471; *Rogers v. Hackett*, 21 N. H. 100; but the declarations or admissions of an indorsee or former owner, made *after* the note is assigned, are never admissible. *Bartlett v. Marshall*, 2 Bibb (Ky.), 467; *Robb v. Schmidt, ante*; *Lister v. Baker*, 6 Blackf. (Ind.) 439; *Matthews v. Houghton*, 10 Me. 420.

*Self-disserving evidence — How supplied — Words —
Writing — Signs — Silence.*

§ 521. We return, therefore, to the more important and difficult subject of *self-disserving* evidence. This may be supplied by *words*, *writing*, *signs*, or *silence*. "Non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis."¹ Words addressed to others, and writing, are no doubt the most usual forms; but words uttered in soliloquy seem equally receivable;* while of signs it has justly been said, "Acta exteriora indicant interiora secreta."² Thus, a deaf and dumb person may be called on to plead, or advocate his cause, through the medium of an interpreter who can explain his signs to the court and jury.³ So of silence, "qui tacet, consentire videtur,"⁴—a maxim which must be taken with considerable limitation. A far more correct exposition of the principle contained in it is the following: "Qui tacet, non utique fatetur: sed tamen verum est, eum non negare:"⁵ and one of our old authorities tells us [* 662] *with truth, "Le nient dedire n'est cy fort come le confession est,"⁶ which seems fully recognized in modern times.⁷ The maxim is also found guarded in this way, "Qui tacet consentire videtur, ubi

¹ 10 Co. 144 a. See *Ford v. Elliott*, 4 Exch. 78.

² *R. v. Simons*, 6 C. & P. 540.

³ 8 Co. 146 b; Wing. Max. 108; Broom's Max. 296, 4th Ed.

⁴ *R. v. Jones*, 1 Leach, C. L. 102; *R. v. Steel*, Id. 451.

⁵ 12 Hen. VIII. 8; Hob. 102; Jenk. Cent. 1, Cas. 64; Cent. 2, Cas. 30; Cent. 5, Cas. 87; Sext. Decretal. lib. 5, tit. 12, de reg. juris, Reg. 43.

⁶ Dig. lib. 50, tit. 17, l. 142. See also Sext. Decretal. lib. 5, tit. 12, de regulis juris, Reg. 44.

⁷ Long. Quint. 125, 126.

⁸ *Hayslep v. Gymer*, 1 A. & E. 162. See *Morgan v. Evans*, 3 Cl. & F. 205; *Gaskill v. Skene*, 14 Q. B. 664, and *Boyle v. Wiseman*, 10 Exch. 651.

tractatur de ejus commodo.”¹ The principal application of this maxim is in criminal cases, where a person charged with having committed an offense makes no reply; the force and effect of which will be more fully considered in another place.²

“Judicial” and “extra-judicial.”

§ 522. As to the different kinds of self-disserving statements. In the first place they are either “Judicial” or “Extra-judicial,”—*in judicio* or *extra judicium*:³ according as they are made in the course of a judicial proceeding, or under any other circumstances.

Admissions and Confessions.

§ 523. 2. Self-disserving statements in civil cases are usually called “Admissions,” and those in criminal cases “Confessions.” The latter term is, however, sometimes used in civil pleadings, as when we speak of pleas in confession and avoidance. The civilians and canonists express all kinds under the term “confessio.”

“Plenary” and “Not plenary.”

§ 524. 3. Self-disserving statements are divisible into “Plenary” and “Not plenary.” A “Plenary” confession is when a self-disserving statement is such as, if believed, is conclusive against the person making it, at least on the physical facts of the matter to which it relates: as where a party accused of murder says, “I murdered,” or “I killed,” the deceased. In such cases the proof is in the nature of *direct* evidence, and

¹ 20 Hen. VI. 13 b.

² See *infra*, sect. 8, sub-sect. 3.

³ 1 Greenl. Ev. § 216, 7th Ed.; 1 Ev. Poth. §§ 797, 801.

[* 663] *the maxim is "habemus optimum testem, confitentem reum."¹ A confession "not plenary" is, where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates, but only gives rise to a presumptive inference of their truth; and is, therefore, in the nature of *circumstantial* evidence.² *E. g.*, A. is found murdered, or the goods of B. are proved to have been stolen, and the accused or suspected person says, "I am very sorry that I ever had any thing to do with A.," or "that I ever meddled with the goods of B." These expressions are obviously ambiguous; for, although consistent with an intention to avow guilt, they are equally so with an expression of regret that circumstances should have occurred to cast unjust suspicion on the speaker. So, where a person accused of an offense admits that he intended, or even threatened, to commit it, or that he fled to avoid being tried for it.³

Admissible as primary evidence of written documents.

§ 525. Although, as already stated, self-disserving evidence is, in general, admissible against the party supplying it, it has been made a great question whether this extends to the proof of the contents of written instruments or documents — whether the principle, that such are the best or primary evidence of their own contents, does not override the principle under consideration. Elementary as this point may seem, it has only been settled of late years, if, indeed, it can be deemed fully settled even now; and there is probably not one question to be

¹ Ph. & Am. Ev. 419; 2 Hagg. Cons. Rep. 815.

² 3 Benth. Jud. Ev. 108.

³ See *suprà*, ch. 2, sect. 3, sub-sect. 3.

found in the whole law of England, which has caused greater difference of opinion. After a long series of irreconcilable dicta and rulings at *Nisi Prius*,¹ the *subject came before the Court of Exchequer in Michaelmas Term, 1840, in the case of *Slat-terie v. Pooley*.² [* 664] There the question was, whether a debt, for which an action had been brought by one J. T. against the plaintiff, was included in the schedule to a certain composition deed. The schedule being inadmissible as evidence for want of a proper stamp, a verbal admission by the defendant, that the debt in question was the same with that entered in the schedule, was rejected by Gurney, B., at *Nisi Prius*; on the ground that the contents of a written instrument, which is itself inadmissible for want of a proper stamp, cannot be proved by parol evidence of any kind. The plaintiff having been nonsuited, a rule was obtained for a new trial, against which cause was shown, and several of the previous cases cited. The court, however — consisting of Parke, Alderson, Gurney and Rolfe, BB. — having taken time to consider, unanimously made the rule absolute, without hearing counsel in support of it. Parke, B., in delivering his judgment, says, p. 668: “We who heard the argument (my brother Alderson, who is absent, as well as ourselves) entertain no doubt that the defendant’s own declarations were admissible in evidence to prove the identity of the debt sued for with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who

¹ These will be found collected in an article by the author in the *Monthly Law Mag.* vol. 5, p. 175.

² 6 M. & W. 664.

was not present at the argument, entirely concurs. The authority of Lord Tenterden at *Nisi Prius*, in the case of *Bloxam v. Elsee*,¹(a) is no doubt to the contrary; but since that case, as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing; * * * and any one experienced in the conduct [* 665] *of causes at *Nisi Prius* must know how constant the practice is. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost

¹ Ry. & M. 187; 1 C. & P. 558.

(a) In *Davy v. Morgan*, 56 Barb. (N. Y.) 218, the plaintiff offered in evidence a written contract between him and the defendant, upon which the action was predicated. The contract was not stamped, as required by law, and was therefore rejected as evidence. The plaintiff then offered to show, by parol, that a contract, identical with that set forth in the written contract, was made between him and the defendant. But the evidence was rejected, the court holding that the contract having been reduced to writing, and signed by the parties, could not, so long as it remained in the possession of the plaintiff, be proved by parol, and the fact that, through a neglect on the part of the parties to comply with the law, the contract was rendered inadmissible in evidence, did not cure the matter or make parol proof of its contents, or of the contract between them, admissible. See, also, *Turner v. State*, 48 Ala. 549.

But, *quere*, if the plaintiff had added counts for money had and received, or work and labor done, and goods sold and delivered, and had claimed a recovery under those, would the evidence not have been competent, and could not a recovery have been had in *that* action? Such has been the rule adopted in other States; *Miller v. Morrow*, 5 Heisk. (Tenn.) 688; and an unstamped document is not admissible in evidence in a State court for any purpose; *Turnpike Co. v. McNamara*, 72 Penn. St. 278; 13 Am. Rep. 673; but to the contrary, see the following cases collected from a note to *Turnpike Co. v. McNamara*, *ante*; 13 Am. Rep. 673; *Bumpas v. Taggart*, 26 Ark. 398; 6 Am. Rep. 623; *Green v. Holloway*, 101 Mass. 243; 3 Am. Rep. 339; *Daily v. Coker*, 33 Tex. 815; 7 Am. Rep. 279; *Burson v. Huntingdon*, 21 Mich. 415; 4 Am. Rep. 497; *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Davis v. Richardson*, 45 Miss. 499; 7 Am. Rep. 32; *Sammons v. Holloway*, 21 Mich. 163; 4 Am. Rep. 165; *Moore v. Moore*, 47 N. Y. 467; 7 Am. Rep. 466; *Moore v. Quirk*, 105 Mass. 49; 7 Am. Rep. 499

every trial would be nearly insuperable. The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of, the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible."

§ 526. The authority of *Slatterie v. Pooley*, at least so far as relates to extra-judicial statements, has been recognized and acted on in a great many cases,¹ but has been severely attacked in Ireland,² and has been questioned in this country.³ In *Lawless v. Queale*,⁴ Lord Chief Justice Pennefather, speaking of that case, says, "The doctrine there laid down is a most dangerous proposition; by it a man might be deprived of an estate * of 10,000*l.* per annum, derived from his ancestors [* 666]

¹ *Howard v. Smith*, 3 Scott, N. R. 574; *Boulter v. Peplow*, 9 C. B. 493; *Pritchard v. Bagshawe*, 11 Id. 459; *King v. Cole*, 2 Exch. 628; *Boileau v. Rutlin*, 2 Exch. 665; *Ridley v. The Plymouth Grinding Company*, 2 Exch. 711; *Toll v. Lee*, 4 Id. 230; *Murray v. Gregory*, 5 Exch. 468; *R. v. The Inhabitants of Basingstoke*, 14 Q. B. 611; *R. v. Welch*, 2 Car. & K. 296; 1 Den. C. C. 199; *Ansell v. Baker*, 3 Car. & K. 145, &c.

² *Lawless v. Queale*, 8 Ir. Law Rep. 382.

³ Tayl. Ev. §§ 382 *et seq.*; 4th Ed.; *Sanders v. Karnell*, 1 F. & F. 356.

⁴ *Lawless v. Queale*, 8 Ir. Law Rep. 382. See the observations of Crampton, J., in that case; and also *Thunder v. Warren*, Id. 181.

by regular family deeds and conveyances, by producing a witness, or by one or two conspirators who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged or otherwise incumbered it; and thus, by the facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." Now we must protest in toto against trying the *admissibility* of evidence by such a test as this. The most respectable and innocent man in the community may be hanged for murder on the unsupported testimony of a pretended accomplice; or sent to penal servitude for rape on the unsupported oath of an avowed prostitute; but is this a reason for altering the law with reference to the admissibility of the evidence of accomplices, or prostitutes, or do innocent men feel themselves in danger from it? The weight of the species of proof under consideration varies *ad infinitum*. Look at the different forms in which it may present itself — plenary confession in *judicio*; non-plenary confession in *judicio*; plenary quasi judicial confession before a justice of the peace; non-plenary quasi judicial confession before a justice of the peace; plenary extra-judicial confession to several respectable witnesses; the like to one such witness; non-plenary extra-judicial confession to several respectable witnesses; the like to one such; plenary extra-judicial confession to several suspected witnesses; the like to one such; non-plenary extra-judicial confession to several suspected witnesses; the like to one such: and under the term "non-plenary" is included every possible degree of casual observation, or even sign, from which the existence of the principal fact may be collected. The shade between the probative force of any

two of these degrees is so slight as to be almost imperceptible, and yet of all forms of evidence the highest of *these is perhaps the most satisfactory, and the lowest the most dangerous. The *value* of self- [* 667] disserving evidence, like that of every other sort of evidence, is for the jury; its *admissibility* is a question of law — the test of which is to see if the evidence tendered is in its nature original and proximate;¹ and it will scarcely be contended that self-disserving statements of all kinds do not fulfill both those conditions. It may, indeed, be objected that they usually come in a parol or verbal shape, and that parol evidence is inferior to written, but that is a maxim which has been much misunderstood.² The contents of a document could most unquestionably be proved, by a chain of circumstantial evidence composed of *acts*, every link in which might be established by parol or verbal testimony.

But not to prove the execution of a deed, except under the
17 & 18 Vict. c. 125, s. 26.

§ 527. But although a party might admit the contents of a document, he could not, before the 17 & 18 Vict. c. 125, by admitting the *execution* of a deed (except when such admission was made for the purpose of a cause in court) dispense with proof of it by the attesting witness. The rule “*omnia præsumuntur ritè esse acta*” was here reversed; the courts holding that, although a party admitted the execution of a deed, the attesting witnesses might be acquainted with circumstances relative to its execution which were unknown to him, and which might

¹ See bk. 1, pt. 1, §§ 88, 89, 90.

² See bk. 2, pt. 3, § 223.

have the effect of invalidating it altogether.¹ The decisions establishing this dogma were previous to *Slatterie v. Pooley*, and seem to have been a remnant of the old practice of trying deeds by the witnesses to them.² And the rule was not affected by the alteration made in the law by 14 & 15 Vict. c. 99, *which rendered the [* 668] parties to a suit competent witnesses.³ But now, by the 17 & 18 Vict. c. 125, s. 26, any instrument, to the validity to which attestation is not requisite, “may be proved by admission or otherwise, as if there had been no attesting witness thereto.”

To whom self-disserving statements, &c., may be made.

§ 528. So far as its admissibility in evidence is concerned, it is in general immaterial *to whom* a self-disserving statement is made.⁴ But if coming under the head of what the law recognizes as confidential communication, it will not be received in evidence ;⁵ neither will it if embodied in a communication made “without prejudice,” the object of such being to buy peace, and settle disputes by compromise instead of by legal proceedings.⁶ It has indeed been held that, in order to render an account stated binding on a party, the admission of liability must be made to the opposite party or his agent ;⁷ but this only

¹ *Call v. Dunning*, 4 East, 53 ; *Abbot v. Plumbe*, 1 Dougl. 216 ; *Johnson v. Mason*, 1 Esp. 89 ; *Cunkliffe v. Sefton*, 2 East, 183 ; *Barnes v. Trompowsky*, 7 T. R. 265.

² See bk. 2, pt. 3, §§ 220–221.

³ *Whyman v. Garth*, 8 Exch. 803.

⁴ The old French lawyers drew some nice distinctions as to the effect of statements made to the opposite party or to strangers. See 1 Ev. Poth. § 801.

⁵ See *infra*, ch. 8.

⁶ *Cory v. Bretton*, 4 C. & P. 462 ; *Healey v. Thatcher*, 8 Id. 388 ; *Paddock v. Forrester*, 3 M. & Gr. 903.

⁷ *Breckon v. Smith*, 1 A. & E. 488, per Littledale, J. ; *Hughes v. Thorpe*, 5 M. & W. 667, per Parke, B. ; *Bates v. Townley*, 2 Exch. 156, per Parke, B.

refers to the effect of the admission, not to its admissibility. A distinction was formerly sought to be drawn, where a confession was made by a prisoner in consequence of an inducement to confess, held out by a party who had no authority over him or the charge against him. Although such an inducement does not exclude confessions made to others,¹ it was doubted whether it would not exclude confessions made to the person holding out the inducement: but this distinction has been overruled.²

State of mind of party making self-disserving statement, &c.— Drunkenness — Talking in sleep — Unsoundness of mind.

*§ 529. Self-disserving statements, &c., made by a party when his mind is not in its natural [* 669] state, ought, in general, to be received as evidence, and his state of mind should be taken into consideration by the jury as an infirmative circumstance.³ Thus a confession made by a prisoner when drunk has been received;⁴ (a) and although contracts entered into by a party in a state of total intoxication are void, it is otherwise where the intoxication is only partial, and not sufficient to prevent

¹ *R. v. Dunn*, 4 C. & P. 543; *R. v. Spencer*, 7 Id. 776.

² *R. v. Taylor*, 8 C. & P. 733.

³ "Circa ejusmodi instrumenta firmanda vel destruenda multum habet operis oratio, si quæ sint voces per vinum, somnium, dementiam emissæ;" Quint. Inst. Orat. lib. 5, c. 7.

⁴ *R. v. Spilsbury*, 7 C. & P. 187.

(a) As to whether a confession made by a prisoner when drunk shall be received against him or not depends upon the fact whether he was so far intoxicated as not to understand what he was confessing. If he was, his confession is no evidence of his guilt, and the question, as to his condition in this respect, may be submitted to the jury, under instructions to reject the evidence in the one case or weigh it in the other. *Com. v. Howe*, 9 Gray (Mass.), 110; *Eskridge v. State*, 25 Ala. 30.

his being aware of what he is doing.' So, what a person has been heard to say, while talking in his sleep, seems not to be legal evidence against him,' (a) however valuable it may be as indicative evidence; for here the suspension of the faculty of judgment may fairly be presumed complete.' The acts of persons

¹ *Gore v. Gibson*, 13 M. & W. 623; 9 Jur. 140 and the note there, p. 142. See also Mascard. de Prob. Concl. 580.

² This point arose in the case of *R. v. Elizabeth Sippets*, Kent Summ. Ass. 1839, where Tindal, C. J., was inclined to think the evidence not receivable. Ex relatione. See also per Alderson, B., in *Gore v. Gibson*, 13 M. & W. 623, 627; 9 Jur. 140, 142.

³ Bk. 1, pt. 1, § 93.

⁴ Such a phenomenon may often be of the utmost importance as *indicative* evidence.

"Multi de magnis per somnum rebu' loquuntur
Indicioque sui facti persæpe fuere."

LUCRETIUS, lib. 4, vv. 1012-13. See also lib. 5, v. 1157.

"There are a kind of men so loose of soul,
That in their sleeps will mutter their affairs.
* * * Nay, this was but his dream.
But this denoted a foregone conclusion.
'Tis a shrewd doubt, tho' it be but a dream."

OTHELLO, Act. 3, Sc. 3.

The following excellent instance is taken from Mr. Arbuthnot's Reports of Criminal Cases in the Court of Foujdaree Udalt, of Madras, p. 61. Five prisoners — named respectively Dasan Nayakan, Nachan, Venkatachalam, Tandavarayan and Chokan — were tried in September, 1834, for the willful murder of one Perumal Naik. The deceased having been found murdered and much mutilated, the head lying on an ant-hill away from the rest of the body, suspicion fell on one Venkatasami, with whom he was on bad terms. Venkatasami's answers when questioned on the subject not being satisfactory, he was kept under surveillance in the house of a neighbor, and in the course of the following night was heard to talk in his sleep, allowing the following expressions to escape him. "Dasan, catch hold of the hands. Nachan, cut off the head.

(a) This question came up in *People v. Robinson*, 19 Cal. 40, and the court refused to receive such evidence, upon the ground that a person was as liable to talk of matters in his sleep, of which he had never heard, as he was to dream of matters that never existed. That during one's sleep the faculties of the mind are suspended, and a person cannot be held responsible, either for what he says or does.

* of unsound mind also are not in general binding; but this is subject to some exceptions, [* 670] which will be found collected in the case of *Molton v. Camroux*.¹

Self-disserving statements made under mistake — Of fact — Of law.

§ 530. A party is not in general prejudiced by self-disserving statements made under a mistake of *fact*. "Ignorantia facti excusat."² "Non videntur, qui errant, consentire,"³ and "Non fatetur qui errat,"⁴ said the civilians. So, money may be recovered back which was paid under a forgetfulness of facts which were once within the knowledge of the party paying.⁵ (a) But

Tandavarayan, Chokan, and Venkatachalam, catch hold of his leg — come, we may go home after we have deposited the head on the top of an ant-hill." These words having been next morning reported to the authorities, Venkatasami was taken into custody and taxed with the murder, which he at once confessed, criminating the prisoners, whose names had been mentioned by him in his sleep, and who, on being apprehended, likewise confessed their guilt. Venkatasami and Nachan died before trial, but the other four were convicted, chiefly on their own confession, and left for execution.

¹ 2 Exch. 487; affirmed on error, 4 Id. 17.

² Lofft, M. 553.

³ Dig. lib. 50, tit. 17, l. 116.

⁴ 1 Ev. Poth, § 800.

⁵ *Kelly v. Solari*, 9 M. & W. 54, and the cases there referred to.

(a) Where money is paid to another under a mistake of fact, or under duress or fraud, it may always be recovered back; *Tutt v. Ide*, 3 Blatch. (U. S. C. C.) 249; *Ogden v. Maxwell*, 3 id. 319; *Guy v. Washburn*, 23 Cal. 111; *American, etc., Ins. Co. v. Britton*, 8 Bosw. (N. Y.) 148; *North v. Bloss*, 30 N. Y. 374; *Norton v. Marden*, 3 Shepl. (Me.) 45. Money paid under threats of a lawsuit is not regarded as being paid under duress; *Evans v. Gale*, 13 N. H. 397; nor even after the goods of the person have been attached at the suit of the one to whom the money was paid; *Kohler v. Wells*, 26 Cal. 606; nor if the money was really due to the person to whom it was paid, can it be recovered back, whatever may have been the means employed to secure its payment. *Scientes v. Odier*, 17 La. Ann. 153. Money paid under a mistake or ignorance of *law* can never be recovered back; *Mayer v. Judah*, 5 Leigh (Va.), 305; *Trustees v. Kel-*

it is very different when the confession is made under a mistake of *law*. Here the civilians say, "Non fatetur, qui errat, nisi jus ignoravit."¹ Neither is a party to be prejudiced by a *confessio juris*,² although this must be understood with reference to a confession of law not involved with facts, for the confession of a matter compounded *of law and fact is receivable. Every [* 671] prisoner or defendant, who pleads guilty in a criminal case, admits by his plea both the acts with which he is charged and the applicability of the law to them. So, on an indictment for bigamy, the first marriage, even though solemnized in a foreign country, may be proved by the admission of the accused.³(a)

¹ Dig. lib. 42, tit. 2, l. 2; 1 Ev. Poth. § 800. See *suprà*, ch. 2, sect. 2, subsect. 1.

² 1 Greenl. Ev. § 96, 7th Ed.

³ 1 East, P. C. 471; *R. v. Newton*, 2 Moo. & R. 503; *R. v. Simmonsta*, 1 Car. & K. 164. But see *R. v. Flaherty*, 2 Id. 782.

ler, 1 Ala. 406; *Bean v. Jones*, 8 N. H. 149; *Natcher v. Natcher*, 47 Penn. St. 496; but when the mistake is in reference to a foreign law it will be regarded as a mistake of fact, as no man is bound to know the law of any other country, except the one to whose jurisdiction he is subject. *Norton v. Marden*, 3 Shepl. (Me.) 45.

(a) So in an indictment for incest the defendant's admission of relationship is admissible against him. *People v. Jenness*, 5 Mich. 305.

The question as to whether or not a confession shall be admitted in evidence depends upon the circumstances under which it was made. A prisoner may plead guilty and withdraw his plea without prejudice. It often happens that a court will not accept such a plea, where there are reasons to suspect that he has been unduly urged to make it. *United States v. Nott*, 1 McLean (U. S.), 499. So the admission by a prisoner on trial for bigamy that he has another wife living is admissible against him. *Stangelin v. State*, 17 Ohio St. 452; *Wolverton v. State*, 16 id. 153.

So in an indictment for lewd cohabitation, bigamy, or adultery, the prisoner's admission of marriage, if in another State or country, is held admissible. *Caufford's Case*, 7 Me. 57.

By whom self-disserving statements, &c., may be made.

§ 531. Self-disserving statements, &c., may, in general, be made either by a party himself, or by those under whom he claims, or by his attorney or agent lawfully authorized—an application of the maxims “*Qui per alium facit, per seipsum facere videtur*,”¹ “*Qui facit per alium facit per se*.”²(a) This, of course, means

¹ Co. Litt. 258 a; 4 Inst. 109; 10 Co. 33 b; 2 Jur., N. S. 18. See, also, Sext. Decret. lib. 5, tit. 12, de reg. jur., Reg. 72.

² Lofft, M. 163; 9 Cl. & F. 850.

(a) The admissions or declarations of an agent, in reference to a matter in which he has authority to bind his principal, are, if material to the issue, always admitted as evidence *against* his principal. The rule is, that whatever is said or done by an agent in reference to the business in which he is employed within the scope of his authority, and during its existence, is said or done by the principal, and is as obligatory and binding upon the principal as though said by himself; *Cliquot's Champagne*, 3 Wall. (U. S.) 114; *Batchelder v. Emery*, 20 N. H. 165; *Runk v. Ten Eyck*, 24 N. J. 756; *Winter v. Burt*, 31 Ala. 33; but in order to make any representations or declarations of the agent, in reference to the subject-matter involved, admissible, they must have been made *at the time of*, and constitute a part of, the *res gestæ*. His declarations and representations are never admissible, unless if they had been made by the principal himself, they would also be admissible. Declarations made by him *after* the agency is closed are never admissible, as his authority in reference to the matter is ended; nor his declarations made *before* the transaction is had, unless they operate as an inducement to the contract; *Covington*, etc., R. R. Co. v. *Ingles*, 15 B. Monr. (Ky.) 637; *Tuttle v. Turner*, 28 Texas, 759; *Wiggins v. Leonard*, 9 Iowa, 194; *Woods v. Banks*, 14 N. H. 101; *Fogg v. Child*, 13 Barb. 246; *Burnham v. Ellis*, 39 Me. 319; *Cortland Co. v. Herkimer Co.*, 44 N. Y. 22; and to make his representations, declarations or admissions evidence against his principal, his agency must be clearly established by evidence other than his own declarations; *Hatch v. Squires*, 11 Mich. 181; *Farmer v. Lewis*, 1 Bush (Ky.), 66; *Robeson v. Schuylkill Nav. Co.*, 3 Grant's Cas. (Penn.) 186; *Moffitt v. Cresler*, 8 Iowa, 122; *Craighead v. Wells*, 21 Mo. 404; *Mapp v. Phillips*, 32 Ga. 72; *Woodbury v. Larned*, 5 Minn. 339; *Marsh v. Hammond*, 11 Allen, 483; *Brigham v. Peters*, 1 Gray (Mass.), 139; and must relate to the subject-matter of the agency, be within the scope of his authority, and made before his agency or authority has ceased. Admissions or declarations made by him after his agency is ended are excluded upon a double ground: First, because he no longer represents the principal; and, secondly, upon

that the party against whom the admission or confession is offered in evidence is of capacity to make one. On this subject the civilians laid down, "*Qui non*

grounds of public policy. The business of the commercial world has become so extensive that it is impossible that principals can attend to the various departments of their business. They are, therefore, compelled to employ others to act for them; and during the period that those others are acting for them, within the scope of their powers, the maxim *qui facit per alium facit per se* applies; but, when that employment has ceased, the power of the agent has ceased; and, if his loose declarations, statements or admissions in reference to the business in which he had formerly been engaged for his principal were to be admitted as evidence, the whole commercial and business world would be at the mercy of and subject to the caprice of a set of irresponsible men, who had formerly been in their employ. The agent himself may be sworn as a witness against his principal, in reference to any matter in which he has acted for him, and this either before or after his agency is ended; but he cannot manufacture evidence against him by his declarations and statements made out of court. *Runk v. Ten Eyck*, 24 N. J. 756; *Vail v. Judson*, 4 E. D. Smith (N. Y. C. P.), 165; *Brigham v. Carr*, 21 Tex. 142; *Stiles v. Western R. R. Co.*, 8 Metc. (Mass.) 44; *Caldwell v. Garner*, 31 Mo. 121; *Garfield v. Knight's Ferry Co.*, 14 Cal. 35; *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446; *Austin v. Chittenden*, 33 Vt. 353; *Keeler v. Salisbury*, 35 N. Y. 648. In *Haven v. Brown*, 7 Me. 421, the court says: "The declarations of a general agent even, made after the making of a contract for his principal, cannot be received to affect the rights of his principal already acquired." In *Patterson v. Railroad Co.*, 4 Rich. (S. C.) 153, it was held that declarations made by an agent, the day after a transaction, for his principal cannot be regarded as a part of the *res gestæ*, and are not admissible in evidence either for or against him. And an agent's declarations, admissions or statements are *never* admissible, unless they are made in reference to matters *strictly within the scope of his authority*, and this authority must be proved, and the declarations of the agent, even though accompanied by acts ostensibly in behalf of his principal, are not admissible to establish the authority. The jury must be satisfied that the agent had authority to do the acts, and to make the statements relied on, and this may be established by the course of dealing between the principal and agent, and what transpired between them in reference to the particular act tending to show such authority; *Brigham v. Peters*, 1 Gray (Mass.), 139; *Woodbury v. Larned*, 5 Minn. 339; and it is competent for the principal upon that question to show a conversation between him and his agent to show the extent of his knowledge in reference to what was done by his agent in reference to the matter in question, as well as the power of the agent in reference to the transaction. *Davenport, etc., Ass'n v. American, etc., Ins. Co.*, 16 Iowa, 74. So the party setting up the statements of the agent may introduce evidence showing that no complaints were made by the principal in reference to the manner

potest donare non potest confiteri.”¹ So there are some acts which cannot be done by attorney, and some persons who cannot appoint one — as, for instance, infants. And

¹ 1 Ev. Poth. § 804.

in which the agent discharged his duties, because in such a case it is presumed that the agent acted within the scope of his authority; *Ford v. Danks*, 16 La. Ann. 119; but evidence that the agent had made similar declarations to others, in a similar transaction in behalf of his principal, is not admissible for any purpose against the principal. *Ganson v. Madigan*, 15 Wis. 144. To summarize, in order to make an individual party to a suit responsible for the declarations or admissions of another, it must appear that such declarations were made by a person having authority to act, in reference to the particular matter to which such declarations or admissions relate, in behalf of the person sought to be thereby charged. *Baring v. Clark*, 19 Pick. (Mass.) 220; *Beardsley v. Steinmish*, 29 Md. 268; *Neeley v. Nagle*, 23 Cal. 152; *Gooch v. Bryant*, 13 Me. 386; *Austin v. Chittenden*, 33 Vt. 553. The statements relied on must be shown to have been made before his power as agent over the matter to which it relates had ceased. His agency as to that matter must be shown to have been in force at the time in question. If his control or authority in reference to it had ended, although his agency for the person for other purposes continues, his statements or admissions are of no binding force. *Williams v. Williams*, 6 Ired. (N. C.) 281; *Davis v. Whitesides*, 1 Dana (Ky.), 177; *Levy v. Mitchell*, 6 Ark. 138; *Waterman v. Peet*, 11 Ill. 648; *Raiford v. French*, 11 Rich. (S. C.) 367. When a person authorized to purchase a particular class of goods for a person has made a purchase of a party for his principal, whatever he says in reference to the matter, at the time of purchase, relating thereto, within the scope of his authority, will be binding upon the principal, and may be given in evidence against him; and the same is true of the sale of property by him; but when the contract is made, and the property delivered, and the agent has nothing more to do in reference to that particular transaction, his authority as to it has ceased; and, although he still remains in the employ of his principal as his agent in other similar transactions, this does not make his declarations or admissions evidence against his principal in reference to those former transactions. But if his authority over the matter has *not* ceased, if it still remains under his control for *any* purpose, his admissions in reference to it may be given in evidence against his principal. Thus, in *Burnside v. Grand Trunk R. R. Co.*, 47 N. H. 554, it was held, in an action to recover of a railroad company for goods delivered to it for transportation, which had never been delivered by it to the party to whom they were consigned, that the admissions of the general freight agent for the company, to whom the goods were delivered, made eight months after the goods were delivered to him, were competent evidence against his principal, because the goods having been delivered to him as agent, and the principal never having discharged its duty by delivering

the person appointed to act for another cannot delegate this authority to a third, it being a maxim of law, "*Delegata potestas non potest delegari*,"¹ "*Delegatus non potest delegare*."²

¹ 7 C. B., N. S. 496, 498; 2 Inst. 597.

² Broom's Max. 807, 809, 4th Ed.; 3 M. & W. 319-20; 5 Bingh. N. C. 310; 8 C. B. 630.

the goods, his agency in reference to the particular transaction must be regarded as continuing. In all instances where this species of evidence is offered, it is the province of the court to say whether the party offering it has made such a *prima facie* showing, as to the authority of the agent *at the time when they were made*, as entitles him to give them in evidence; *Munroe v. Statts*, 9 Ired. (N. C.) 49; and if there is *any* evidence tending to show that he had authority at the time of making the admissions relating to the particular subject-matter in question, they may properly be submitted to the jury to find whether the agent had authority to make them, and if so, to weigh them against the principal, or otherwise to reject them entirely. *Wendell v. Abbott*, 45 N. H. 349. The *order* in which proof of authority on the part of an agent shall be shown is a matter resting in the discretion of the court. It may require proof of authority in the first instance, and this cannot be done by the declarations of the agent, but must be by proof *aliunde*, as that the principal knew of, and ratified his act; or it may admit the evidence, leaving him to prove authority on the part of the agent before the close of his case, or have the testimony stricken out. *Woodbury v. Larned*, 5 Minn. 339.

In reference to admissions made by an agent after his agency, in reference to the matter in question, has ceased, it has been held that, where it becomes material to show that the principal had knowledge of the quality of the goods bought or sold by the agent, or knowledge of any material fact in reference thereto, it is competent to show the declarations of the agent as to *his* knowledge of the quality of the goods, or of the fact in question, for the purpose of showing the principal knowledge, even though the agency had ceased when the declarations were made; *Horner v. Fellows*, 1 Doug. (Mich.) 51; *McAulay v. West'n Vt. R. R. Co.*, 33 Vt. 311; as a principal is to be charged with a knowledge of all facts known to his agent at the time when a given transaction is entered into in reference to the subject-matter of his action. *Patten v. Merchants' Ins. Co.*, 40 N. H. 375.

It should be borne in mind that the mere fact that a person is in the employ of another, and is his agent in respect to certain matters, does not make him an agent in reference to other matters, however naturally those other matters are connected with the special matter over which the agent has authority.

Thus, it has been held that the declarations of a foreman of a quarry, as to the character of the stone quarried from the quarry over which he has charge, are not admissible in evidence against his principal, unless it is also shown

*SECTION II.

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ESTOPPELS.

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Estoppels.

§ 532. An important distinction runs through the whole subject of self-disserving evidence, namely, that while in general its value is to be weighed by a jury, the law has invested some forms of it with an absolute and conclusive effect. Such are technically termed

that he has authority to sell the stone, and did sell the stone in question in pursuance of such authority; *Page v. Parker*, 40 N. H. 47; so it has been held that the declarations of a ticket agent after he has sold the tickets in question are not admissible against his principal; *Milwaukee, etc., R. R. Co. v. Finney*, 10 Wis. 388; and, if the agent had not authority to do the act relied on, neither the agent's statement that he had, nor the plaintiff's belief that he had, will make his acts obligatory upon the principal. *McDonnell v. Dodge*, 10 Wis. 106. It must be shown that he *had* authority, that he was acting within the scope of his authority, or that the principal has ratified his acts, and the declarations relied on must be made at the *time* of the transaction, and be a part of the *res gestæ*, or the admissions must have been made before his authority ceased. *Hurlburt v. Kneeland*, 32 Vt. 316; *Garfield v. Knight's Ferry*, 14 Cal. 35.

“Estoppels” — a doctrine the exposition of which, in all its branches, belongs rather to substantive than to adjective law. Some notice of its nature, and the general principles by which it is governed are, however, indispensable here; and estoppels in criminal cases will be more particularly considered in the next section.¹

Nature of.

§ 533. Much misconception and prejudice have arisen from the unlucky definition or description of estoppel given by Sir Edward Coke, namely, that it is where “a man’s own act or acceptance stoppeth or closeth up his [* 673] *mouth to allege or plead the truth.”² If this is looked on as a definition, it violates the rules of logic, by defining by the genus and *non*-essential difference or accident; and if as a description, which indeed Sir Edward Coke himself calls it, it is almost equally objectionable; for one would imagine from the above language, that *truth* was the enemy which the law of estoppel was invented to exclude. So far, however, is this from being the case, that its object is to repress fraud and harassing litigation, and to render men truthful in their dealings with each other; and there can be no question that, rightly understood and properly applied, it often produces those effects, and is a valuable auxiliary in the hands of justice. The definition given in the *Termes de la Ley* is much better: “Estoppel is when one man is concluded and forbidden in law to speak against his own act or deed; yet, though it be to say the truth.” Still “forbidden to say the truth” sounds harsh; and both definitions are inadequate, as not including all

¹ *Infra*, sect. 3, sub-sect. 1.

² Co. Litt. 352 a. See also 2 Co. 4 b.

³ *Termes de la Ley*, tit. Estoppel. See to the same effect, 1 Lill. Pr. Reg. 542.

the cases to which the term "Estoppel" is applicable. On the whole, an estoppel seems to be when, in consequence of some act, generally speaking some act to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim, "*Allegans contraria non est audiendus*;"¹ and is that species of *præsumptio juris et de jure* where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done:—it is in truth a kind of *argumentum ad hominem*.² Hence it appears that "Estoppels" must *not be understood as synonymous with "Conclusive evi- [* 674] dence;" the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal,³ or rendered conclusive on a party, either by common or statute law.

Use of.

§ 534. "Estoppels," observes John W. Smith, is "a head of law once tortured into a variety of absurd refinements, but now almost reduced to consonancy with the rules of common sense and justice. * * * In our old law books truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted. * * * However, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration

¹ 4 Inst. 279; Jenk. Cent. 2, Cas. 63; Broom's Max. 169, 4th Ed.

² See the judgment of the court in *Collins v. Martin*, 1 B. & P. 648.

³ See the observations of the Barnes in *Machu v. The London and South Western Railway Company*, 2 Exch. 415.

should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicæ ut sit finis litium*—but, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representation of others.”¹ “The courts have [* 675] * been, for some time, favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding, in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*.”²

¹ 2 Smith, Lead. Cas. 656, 5th Ed. See also per Curiam, in *Outhbertson v. Irving*, 4 H. & N. 758.

² 2 Smith, Lead. Cas. 725-6, 5th Ed.

Principal rules relative to — Must be mutual or reciprocal.

§ 535. Several rules respecting estoppels are to be found in the books. The most important are the following: 1. That estoppels must be mutual or reciprocal, *i. e.*, binding both parties.¹ (a) But this does not hold universally; for instance, a feoffor, donor, lessor, &c., by deed poll will be estopped by it, although there is no estoppel against the feoffee, &c.² (b) John W. Smith, in the work already cited,³ thinks the rule will be found to apply to those cases only where *both parties* are *intended* to be bound.

In general only affect parties and privies.

§ 536. 2. In general, estoppels affect only the parties and privies to the act working the estoppel; strangers are not bound by them, and cannot take advantage of them.⁴ (c) When, however, the record of an estoppel

¹ Com. Dig. Estoppel, B.; Co. Litt. 352 a; Cro. Eliz. 700, pl. 16.

² Co. Litt. 47 b; 363 b.

³ 2 Smith, Lead. Cas. 660, 5th Ed.

⁴ Co. Litt. 352 a; Com. Dig. Estoppel, B. & C.

(a) Both parties must be bound or neither is. *Griggs v. Smith*, 12 N. J. 22; *Bolling v. Mayor*, 3 Rand. (Va.) 563; *Schumann v. Garratt*, 16 Cal. 100; *Lansing v. Montgomery*, 2 Johns. (N. Y.) 382; *Longwell v. Bentley*, 3 Grant's Cas. (Penn.) 177.

(b) *Massure v. Noble*, 11 Ill. 531; *Longwell v. Bentley*, 3 Grant's Cas. (Penn.) 177; *Miles v. Miles*, 8 Watts & S. 135; *Griffin v. Richardson*, 11 Ired. (N. C.) 439; *Langston v. McKinne*, 2 Murphy (N. C.), 67; *Schumann v. Garratt*, 16 Cal. 100; *Langer v. Filton*, 1 Rawle (Penn.), 141; *Lansing v. Montgomery*, 2 Johns. (N. Y.) 382; *Worcester v. Green*, 2 Pick. (Mass.) 425; *Bolling v. Mayor*, 3 Rand. (Va.) 563; *Williams v. Chandler*, 25 Tex. 4.

(c) A stranger is neither bound by, nor can he take advantage of an estoppel. *Massure v. Noble*, 11 Ill. 531; *Langston v. McKinne*, 2 Murphy (N. C.), 67; *Miles v. Miles*, 8 W. & S. (Penn.) 135; *Deery v. Crary*, 5 Wall. (U. S.) 795; *Williams v. Chandler*, 25 Tex. 4; *Griggs v. Smith*, 12 N. J. 22.

runs to the disability or legitimation of the person, strangers shall both take the benefit of, and be concluded * by, that record ; as in case of outlawry, [* 676] excommunication, profession, attainder of præmunire, of felony, &c.¹ But a record concerning the name, quality, or addition of the person has not this effect.²

Conflicting estoppels neutralize each other.

§ 537. 3. It seems that conflicting estoppels neutralize each other, or, as our books express it, "Estoppel against estoppel doth put the matter at large."³ Thus if the plaintiff in an action makes title to a common by grant within time of memory, and then in another action between the same parties makes title by prescription, and the other admits this, this last estoppel shall avoid the first estoppel, so that the plaintiff may make title to the common by prescription.⁴ So, where in a præcipe quod reddant against two, who pleaded joint tenancy with a third, the demandant said that formerly he brought a writ against one of the two, who pleaded joint tenancy with the other, whereby the writ abated, on which he purchased this writ by journeys accounts, averring that the two were sole tenants on the day of the first writ, &c., whereon the tenants vouched the third party with whom they had pleaded joint tenancy: on its being objected that this voucher could not be received, because they had supposed him joint tenant with them, it was answered that, as the plaintiff had alleged that the defend-

¹ Co. Litt. 352 b.

² Id.

³ Id. ; 2 Smith, Lead. Cas. 660, 5th Ed. ; *R. v. Haughton*, 1 E. & B. 506, per L. Campbell, C. J.

⁴ 1 Ro. Abr. 874, pl. 50, citing 11 Hen. VI. 27 b, 28 a.

ants were sole tenants, he had ousted himself of the right to estop them from that voucher.¹

Different kinds of.

§ 538. Estoppels are of three kinds:² 1. By matter of record; 2. By deed;³ 3. By matter in pais.

Estoppels by matter of record.

§ 539. 1. Estoppels by matter of record; as letters patent, fine, recovery, pleading, &c.⁴ The [677] most important form of this is estoppel by judgment, which will be considered under the head of *res judicata*.⁵

Pleading.

§ 540. With respect to estoppels by pleading. A party not pleading within the time required by law is taken to confess that his adversary is entitled to judgment. So a party may, by resorting to one *kind* of plea, be concluded from afterward availing himself of another. It is a well-known rule of pleading, that pleas in abatement cannot be pleaded after a party has pleaded in bar, and that pleas to the jurisdiction cannot be pleaded after pleas in abatement.

Admissions in pleadings.

§ 541. As to the effect of admissions, express or implied, in pleadings, the following rule, which certainly

¹ Fitz. Abr. Estop. pl. 3, citing 41 Edw. III. 5, pl. 11. For other instances, see 1 Roll. Abr. 874, 875; and D'Anvers' Abridgment, Estoppel, S.

² Co. Litt. 352 a; 2 Smith, Lead. Cas. 657, 5th Ed.

³ Coke (*in loc. cit.*) says, "matter in writing;" but it is clear that "deed" was meant; and in our old books the word "writing" is constantly used in that limited sense. See bk. 2, pt. 3, ch. 1, § 217, p. 386, note 2, and p. 411, § 225, note 4.

⁴ Co. Litt. 352 a; Com. Dig. Estoppel, A. 1; 1 Roll. Abr. 862 *et seq.*, tit. Estoppel.

⁵ *Infra*, ch. 9.

savors of technicalty, is laid down in the books, viz., that the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, cannot be again litigated between the same parties, and are conclusive evidence between them, but only if the traverse is found against the party making it.¹ Still whether, and to what extent, the admitting, or the passing over, a traversable allegation in pleading is to be deemed an admission of it for the purposes of *evidence* at the trial, is a question which has given rise to a considerable conflict of authority and opinion.²

Estoppels by deed — Recitals.

[* 678] *§ 542. 2. Estoppels by deed. “Nemo contra factum suum proprium venire potest.”³ “A deed,” says Mr. Justice Blackstone,⁴ “is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed.” This, however, must be understood of those parts of the deed where the party does solemnly and deliberately avow something; consequently it is a rule that a

¹ Per Parke, B., in delivering the judgment of the court in *Boileau v. Rutlin*, 2 Exch. 665. See *Robins v. Lord Maidstone*, 4 Q. B. 811; Brook. Abr. Protestation, pl. 14; and Co. Litt. 124 b.

² The following are the principal cases on this subject:—*Edmunds v. Groves*, 2 M. & W. 642; *Bennion v. Davison*, 3 Id. 179; *Smith v. Martin*, 9 Id. 304; *Carter v. James*, 13 Id. 137; *Buckmaster v. Meiklejohn*, 8 Exch. 634; *Bingham v. Stanley*, 2 Q. B. 117; *Robins v. Lord Maidstone*, 4 Id. 811; *Bonzi v. Stewart*, 4 M. & Gr. 295; *Fearn v. Ffinea*, 7 Id. 513.

³ 2 Inst. 66; Lofft, M. 322.

⁴ 2 Blackst. Com. 295.

general recital or rehearsal in a deed has not the effect of an estoppel.¹ This is on the principle "*generale nihil certum implicat*;"² it being a rule that an estoppel must be certain to every intent, and is not to be taken by argument or inference;³ and therefore a *special* recital of a particular fact in a deed will estop.⁴(a)

¹ 32 Hen. VI. 16; 35 Id. 34; 2 Leon. 11, pl. 17. See the judgment in *Lainson v. Tremere*, 1 A. & E. 801-2.

² 2 Co. 33 b; 8 Co. 98 a.

³ Co. Litt. 352 b and 303 a.

⁴ See 2 Smith, L. C. 706, 5th Ed.; 1 Wms. Saund. 216, 6th Ed.; *Lainson v. Tremere*, 1 A. & E. 792; *Carpenter v. Buller*, 8 M. & W. 209.

(a) The rule is that parties to a deed are estopped from denying the truth of the recitals therein; *United States v. Benning*, 4 Cranch (U. S. C. C.), 81; *Crane v. Morris*, 6 Peters (U. S.), 598; *Douglass v. Scott*, 5 Ohio, 194; *Jackson v. Parkhurst*, 9 Wend. (N. Y.) 209; *Byrne v. Morehouse*, 22 Ill. 603; *Ridgely v. Bond*, 18 Md. 433; *Campbell v. Knights*, 24 Me. 332; *Redman v. Bellamy*, 4 Cal. 247; but an attorney executing a deed is not himself estopped by the covenants therein; *Kerr v. Chalfont*, 7 Minn. 487; but otherwise of an attorney in fact; *Lee v. Getty*, 26 Ill. 76; so a married woman is estopped by the recitals in a deed executed by her, with her husband, where there are no covenants of warranty; *Graham v. Meek*, 1 Oregon, 325; so a municipal corporation issuing bonds purporting on their face to be issued in conformity to law, when issued by officers having authority to issue them — which must be established by a person seeking to enforce them — is estopped from setting up in defense that they were issued contrary to law; *South Carolina v. Rose*, 1 Strobb. (S. C.) 257; *Moran v. Comm'rs*, 2 Blackf. (Ind.) 722; *Scaggs v. Baltimore, etc., R. R. Co.*, 10 Md. 268; so where a party gives a deed referring to and describing a *voidable* deed, he will be thereby estopped from denying such confirmation, and neither he nor his heirs or assigns can revoke the confirmation; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; so where a party in a deed recites that the grantors in the deed were the owners of the land conveyed, they will be estopped thereby from denying the truth of the recital; *Clamorgan v. Greene*, 32 Mo. 285; *Kinsman v. Loomis*, 11 Ohio, 475; *Smith v. Burnham*, 9 Johns. (N. Y.) 306; so if a person inserts a false date in his deed *he* is estopped from denying it to be the true one; *Kimbro v. Hamilton*, 2 Swan. (Tenn.) 190; but see *Rhine v. Ellen*, 36 Cal. 362; and it is held that a defendant whose land has been sold by the sheriff, upon legal process, is estopped by the deed as much as though it was his own. *O'Neal v. Duncan*, 4 McCord (S. C.), 246. But where the grantor goes behind the deed to defeat it, the estoppel is removed as to the grantee so far as to enable him to give the truth in evidence; *Crosby v. Chase*, 17 Me. 369; so either party may show that one of the grantors was a *feme sole*,

Many cases illustrative of this distinction are to be found in the reports; and the principle governing the subject has thus been laid down: "It seems clear that

¹ See 1 Rol. Abr. 872, Estoppel (P); 1 Wms. Saund. 216, 6th Ed.; 3 Leon. 118, pl. 168.

although the deed describes her as a *feme covert*. *Brinnegar v. Chaffin*, 3 Dev. (N. C.) 108.

There is still another rule in reference to estoppels of this character, and that is, that a party taking a conveyance from a person is estopped from denying his grantor's title thereto; and this extends to his heirs and assigns; *Johnson v. Watts*, 1 Jones (N. C.), 228; *Gardner v. Shark*, 4 Wash. (U. S.) 609; *Kissam v. Gaylord*, 1 Jones (N. C.), 294; *Ellis v. Jeans*, 7 Cal. 409; but this does not extend to a mere quit-claim deed without covenant or fraud, so as to prevent the grantor from acquiring and setting up any other title existing either at the time of his conveyance, or created subsequently; and the title thus acquired may be set up by him against his own deed, where he goes into and holds adverse possession for the statutory period; *Read v. Whittemore*, 60 Me. 469; *Snyder v. Palmer*, 29 Wis. 226; *Cramer v. Benton*, 64 Barb. (N. Y.) 522; *Bruce v. Luke*, 9 Kan. 201; *Shumway v. Johnson*, 35 Md. 33; *Wilson v. King*, 23 N. J. 150; subsequently-acquired titles by the grantor only inure to the benefit of the grantee when there are covenants of warranty in the deeds; and the grantor is not, in the absence of fraud, estopped from acquiring a title to the premises and setting it up against his own deed; *Wilson v. King*, *ante*; *McCusker v. McEvey*, 9 R. I. 528; and this extends to a case where a person has given a deed absolute on its face, but which, in fact, was given under an agreement that he should remain in possession of one-half of the lot, which the grantee was to hold in trust for him, but which he subsequently conveyed. The grantee in such a case is estopped as against the purchaser from setting up title in himself; and the fact that he was in possession is held not to operate as notice of the trust. *Fair v. Howard*, 6 Nev. 304. But a party is not estopped by a void deed; *Wallace v. Miner*, 6 Ohio, 366; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; or a champertous covenant; *Kerchevall v. Triplett*, 1 A. K. Marsh. (Ky.) 493; or when the deed was procured by fraud, duress, or error; *Norton v. Sanders*, 7 J. J. Marsh. (Ky.) 12; nor from maintaining an action, although it be in violation of an executory covenant. *Gibson v. Gibson*, 15 Mass. 106.

The benefit of an estoppel only applies to the *parties* to a deed; *Glidden v. Unity*, 30 N. H. 104; *Cottle v. Snyder*, 10 Mo. 763; *Weidman v. Kohr*, 4 S. & R. (Penn.) 174; and does not operate against a subscribing witness unless he knew the contents of the deed; *Palmer v. Baskerville*, 1 Ired. (N. C.) 252; nor is a person estopped by the recitals in his deed when the whole truth does not appear therein; and if the recitals are founded upon a mistake, or are untrue, he may apply for a reformation of the deed, to have it conform to the truth; *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209; *Warren v. Leland*, 2 Barb. (N.

where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of

Y.) 613; *Den v. Com.*, 19 N. J. 148; nor by recitals not necessary to the conveyance. *Osborne v. Endicott*, 6 Cal. 149.

But it must be remembered that a party is only bound by such recitals as really amount to covenants that run with the land; *Boyce v. Longworth*, 11 Ohio, 235; and where the matter is directly and precisely alleged, and with certainty to every intent. *McComb v. Gilky*, 29 Miss. 146. Estoppels generally do not grow out of mere recitals. In order that they may so operate it must appear from the tenor of the deed itself that it was the object of the parties to make the matter recited a fixed fact as the basis of their action; *Hayes v. Askew*, 5 Jones (N. C.), 63; *Wolcott v. Knight*, 6 Mass. 418; *Ricker v. Ham*, 14 id. 137; *Rhine v. Ellen*, 36 Cal. 362; *Irvine v. McKeon*, 23 id. 472; thus, they are not estopped by its date; *Rhine v. Ellen*, *ante*; or by the consideration stated therein, but may always prove the true date or consideration. *Irvine v. McKeon*, *ante*.

There is another element of estoppels that should not be lost sight of. They must be certain to every intent, and precise and clear; *Lajoye v. Pringan*, 3 Mo. 529; *Rich v. Hotchkiss*, 16 Conn. 409; they must also be mutual, and both parties must be bound thereby, or neither is; *Bolling v. Mayor*, 3 Rand. (Va.) 563; *Longwell v. Bentley*, 3 Grant (Penn.), 177; *Lansing v. Montgomery*, 2 Johns. (N. Y.) 382; *Schumann v. Garratt*, 16 Cal. 100; therefore, they are not binding, except upon parties and their privies. *Griggs v. Smith*, 12 N. J. 22; *Deery v. Crary*, 5 Wall. (U. S.) 795; *Worcester v. Green*, 2 Pick. (Mass.) 425; *Langston v. McKinne*, 2 Murphy (N. C.), 67; *Massure v. Noble*, 11 Ill. 531; *Miles v. Miles*, 8 Watts & S. (Penn.) 135.

As instances of estoppel by deed: A person who has duly executed a deed is estopped from denying either its execution or validity; *Rice v. Boston*, etc., R. R. Co., 12 Allen (Mass.), 141; *Simpson v. Eckstein*, 22 Cal. 580; or a consideration; *Steele v. Adams*, 1 Me. 1; *Hammond v. Woodman*, 41 id. 171; or from claiming any title or interest in the property conveyed; *Green v. Clark*, 13 Vt. 158; *Carbrey v. Willis*, 7 Allen (Mass.), 364; or from denying the grantee's title; *Tewksbury v. Provizzo*, 12 Cal. 20; *Wilkinson v. Scott*, 17 Mass. 249; so where the grantee accepts a conveyance of land, and relies upon such conveyance for title, he is estopped not only from denying his grantor's title, but is also estopped from setting up his incapacity to convey; *Dooly v. Wolcott*, 4 Allen (Mass.), 406; as where a deed was given by a company, purporting to be a corporation, the grantee is estopped from denying their corporate capacity; *id.*; or that a conveyance by a trustee was made in violation of the trust; *Cotton v. Ward*, 3 T. B. Monroe (Ky.), 304; *Taylor v. King*, 6 Munf. (Va.) 358; or from denying the consideration of any mortgage given by his grantor on the premises. *Cooper v. Bigley*, 13 Mich. 463; *Gouveneur v. Titus*, 1 Edw. Ch. (N. Y.) 477.

those facts, though but in the way of recital, shall estop the parties to aver the contrary.”¹ Perhaps
 [* 679] *this would have been more correct, if, instead
 of saying merely “the parties have agreed,” it

¹ Per Coltman, J., in delivering the judgment of the C. P. in *Young v. Raincock*, 7 C. B. 338; recognized and confirmed in *Stronghill v. Buck*, 14 Q. B. 787.

Indeed, the recitals in a deed will never estop the grantee from claiming under an older or paramount title. He may claim under both; *Baldwin v. Thompson*, 15 Iowa, 504; *Moore v. Farrow*, 3 A. K. Marsh. (Ky.) 41; *Hovey v. Woodward*, 33 Me. 470; *Covington v. McNickle*, 18 B. Monr. (Ky.) 262; *Porter v. Sullivan*, 7 Gray (Mass.), 441; *Holt v. Sargeant*, 15 id. 97; *Lorain v. Hall*, 33 Penn. St. 270; *Gardner v. Greene*, 5 R. I. 104; except where the title or interest claimed is wholly inconsistent with that conveyed to him. *Russell v. Watt*, 41 Miss. 602; *Corbett v. Norcross*, 35 N. H. 99. Thus, where one has conveyed to another a special privilege upon the premises, as the right to convey water across the lands, and afterward conveys the land to another without any reservation, the person taking the lands is estopped from denying the right of his grantor to convey such privilege. *Cane v. Talcott*, 5 Day (Conn.), 88. So, where one enters upon land, conveying a life estate to his wife, with remainder to his children, he is estopped from denying the title of his children under the deed. *Pierson v. David*, 1 Iowa, 23. So, where one enters under a sheriff's deed, he is estopped from denying the sheriff's authority to sell. *Morehouse v. Cotheal*, 22 N. J. 521. So, where one holds under partition deed, he is estopped, as against others holding deeds of lots embraced in the partition, either from denying the partition or its regularity. *Corbett v. Norcross*, 35 N. H. 99. Not only is the grantee estopped from denying his grantor's title, but he is also estopped from denying the title of any one in the chain of title essential to uphold it; *Hart v. Johnson*, 6 Ohio, 87; *Ward v. McGuire*, 17 Ga. 303; even though the deed was irregularly admitted to record; *Rochell v. Benson*, 1 Meigs (Tenn.), 3; and he is estopped from denying the validity of reservations in the deed; *Shepard v. Hunt*, 4 N. J. 277; whether he may deny the seizin of his grantor the authorities conflict; *Small v. Proctor*, 15 Mass. 495; *Lee v. Hunter*, 1 Paige's Ch. (N. Y.) 519; *Croxall v. Shered*, 5 Wall. (U. S.) 268; *Glen v. Gibson*, 9 Barb. (N. Y.) 634, holding that he may; while in *English v. Wright*, 1 N. J. 437; *Hamblin v. Bank of Cumberland*, 19 Me. 66; *Dashiel v. Collier*, 4 J. J. Marsh. (Ky.) 401, it is held that he cannot. But there is an exception to the rule even that a grantee may not deny his grantor's title, and this would undoubtedly be recognized by all the courts. For instance, where A is in the possession of lands to which he claims a valid title, and B also claims title to the land, if A, for the sake of peace, buys B's claim and takes a conveyance from him, he is not thereby estopped from denying the title of B. *Lee v. Hunter*, 1 Paige's Ch. (N. Y.) 519; *Gardner v. Green*, 5 R. I. 104; *Giles v. Pratt*,

had been added, "or must be taken to have agreed." When a recital is intended to be the statement of one party only, the estoppel is confined to that party, and the

Dudley (S. C.), 54; *Glen v. Gibson*, 9 Barb. (N. Y.) 634. The rule is that where the purchaser is not in possession under the title, or where he goes into possession under it, yet the conveyance is fraudulent, or he was deceived or imposed upon, he is not estopped by the deed from denying his grantor's title. *Glen v. Davis*, 9 Barb. (N. Y.) 634; *Winlock v. Hardy*, 4 Litt. (Ky.) 272. So, where a subsequent mortgage is, by its terms, made subject to a prior mortgage, the holder of the subsequent mortgage is estopped from denying the validity of the first mortgage, however defective it may be, or even though it merely amounts to an executory contract or equitable lien; *Cole v. Columbus*, etc., R. R. Co., 10 Ohio St. 372; so the mortgagee is estopped from denying the power of the mortgagor to make the mortgage; *Brown v. Combs*, 29 N. J. 36; *Conklin v. Smith*, 7 Ind. 107; so the mortgagor is estopped from denying a title acquired under his mortgage, or to set up any claim in opposition to it; *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Payne v. Burnham*, 2 Hun (N. Y. S. C.), 143; as that he held it in trust; *Boisclair v. Jones*, 36 Ga. 499; or that the mortgage was in fact given for the benefit of a firm of which the plaintiff was a member, and that the other members had not assigned to the plaintiff; *French v. Blanchard*, 16 Ind. 143; but he may show that the consideration is illegal; *Jones v. Jones*, 20 Iowa, 388; *Norris v. Norris*, 9 Dana (Ky.), 317; or fraudulent, even though he has sworn that it was *bona fide*; *Demeritt v. Miles*, 22 N. H. 523; or that he has title to the premises as heir of the mortgagee, who is deceased. *Harding v. Springer*, 14 Me. 407. Where there is a conveyance without warranty, or covenants of further assurance the grantor is not estopped from acquiring title to the same premises from another source; *Kinsman v. Loomis*, 11 Ohio, 475; *Harriman v. Gray*, 49 Me. 537; *Allen v. Hayward*, 5 Me. 227; *Bell v. Twilight*, 26 N. H. 401; *Gibson v. Choteau*, 39 Mo. 536; but if there are covenants for further assurance, he is estopped. *Gluckauf v. Reed*, 22 Cal. 468. But the rule is otherwise as to leases. *McKenzie v. Lexington*, 4 Dana (Ky.), 129. So, a widow who joins with her husband in a mortgage of land is estopped from setting up dower against a purchaser under the mortgage. *Elmendorff v. Lockwood*, 57 N. Y. 322. But where there are covenants of warranty or further assurance, all subsequent titles to the premises acquired by the grantor inure to the benefit of the grantee, whether under an absolute deed or a mortgage. *Kirkaldie v. Larabee*, 31 Cal. 455; *Jarvis v. Aiken*, 25 Vt. 635; *Bush v. Marshall*, 6 How. (U. S.) 284; *Witzel v. Pierce*, 22 Ga. 112; *Dickerson v. Talbot*, 14 B. Monr. (Ky.) 60; *Zunts v. Conveille*, 16 La. Ann. 96; *Mayo v. Lewis*, 4 Tex. 38; *Lowry v. Williams*, 13 Me. 281; *Jarnigan v. Mears*, 1 Humph. (Tenn.) 473; *De Wolf v. Hayden*, 24 Ill. 525; *Comstock v. Smith*, 13 Pick. (Mass.) 176; *Allen v. Parris*, 3 Ohio, 107; *Washabaugh v. Entricken*, 34 Penn. St. 74; *Bush v. Cooper*, 26 Miss. 599; *Jewell v. Porter*, 31 N. H. 34; *Kellogg v. Wood*, 4 Paige's Ch. (N. Y.) 578; *Bundred v. Walker*, 12

intention is to be gathered from construing the instrument.¹

Estoppels by matter, in pais.

§ 543. Estoppels by matter in pais. Of these, Parke, B., in delivering the elaborate judgment of the Court of Exchequer, in *Lyon v. Reed*,² says: "The acts in pais which bind parties by way of estoppel are but few, and are pointed out by Lord Coke, Co. Litt. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery, entry, acceptance of an estate*, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." But, for the reasons already stated,³ the courts of law in modern times, adopting a principle long known in courts of equity,⁴ have wisely extended this species of estoppel beyond its ancient limits; and although the actual decisions respecting its applica-

¹ *Stronghill v. Buck*, 14 Q. B. 787.

² 13 M. & W. 285, 309. See, also, the judgment of Tindal, C. J., in *Sander-son v. Collman*, 4 Man. & Gr. 209.

³ *Suprà*, § 534.

⁴ 1 Fonbl. Eq. bk. 1, ch. 3, sect. 4, 3rd Ed.

N. J. 140; *Hassell v. Walker*, 3 Jones (N. C.), 270; *Warburton v. Mattox*, 1 Morr. (Iowa) 367; *House v. McCormick*, 57 N. Y. 310; *Tefft v. Munson*, 57 id. 97. But such after-acquired title, after the eviction of his grantee, does not inure to the benefit of the grantee against his consent, so as to estop him from maintaining an action on the covenants in his deed. *Blanchard v. Ellis*, 1 Gray (Mass.), 195. Neither is a married woman estopped from acquiring title to premises in the conveyance of which she has joined with her, by the covenants of warranty, and any title so acquired by her does *not* inure to the benefit of the grantee; *Teal v. Woodworth*, 3 Paige's Ch. (N. Y.) 470; nor where the sale was contrary to law. *Atkinson v. Bell*, 18 Tex. 574.

tion in certain cases may admit of question, the following rule has been laid down by authority, and may be looked on as established: "Where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded *from averring against the latter a [* 680] different state of things as existing at the same time."¹ The application of this rule, however, is said to be limited to cases in which the representation amounts to an agreement or license by the party who makes it, or is understood by the party to whom it is made, as amounting to that.² Moreover, by "willfully" in this rule must be understood, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.³ And conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform

¹ *Pickard v. Sears*, 6 A. & E. 469, 474; *Freeman v. Cooke*, 2 Exch. 654, 663; *Howard v. Hudson*, 2 E. & B. 1; *Simpson v. The Accidental Death Insurance Company*, 2 C. B., N. S. 289; *Dunston v. Paterson*, Id. 495, 501-4; *Clarke v. Hart*, 6 Ho. Lo. Cas. 633, 644, 655-6, 669; *Cornish v. Abington*, 4 H. & N. 549; *Gregg v. Wells*, 10 A. & E. 90.

² *Freeman v. Cooke*, 2 Exch. 654, 664; *Clarke v. Hart*, 6 Ho. Lo. Cas. 633, 644, 656; *Cornish v. Abington*, 4 H. & N. 549.

³ *Freeman v. Cooke*, 2 Exch. 654, 663; *Howard v. Hudson*, 2 E. & B. 1; *Cornish v. Abington*, 4 H. & N. 549, 555; *White v. Greenish*, 11 C. B., N. S. 209, 230.

his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorized.¹(a)

How made available.

§ 544. It has been made a question whether estoppels
[* 681] *in pais can be *pleaded*; the objection being, that to plead matter in pais by way of estoppel is a violation of the rule of pleading which prohibits the

¹ *Freeman v. Cooke*, 2 Each. 654, 663. See, also, *The Western Bank of Scotland v. Needell*, 1 F. & F. 461.

(a) When the owner of land or personal property stands by and sees it conveyed to another without remonstrance or notice of his claim, he will, as against one purchasing it who has no notice or knowledge of such claim, be estopped from setting up a claim to the property; *Cady v. Owen*, 34 Vt. 598; *Cheaney v. Arnold*, 18 Barb. (N. Y.) 169; *Mills v. Graves*, 38 Ill. 455; *Dorley v. Rector*, 10 Ark. 211; but this must occur at a time when the party knew the full extent of his right, for if he was ignorant of his right he will not be estopped by his silence, for the reason that, not knowing of his claim, he could not assert it, and his neglect to do so operated no fraud. In order to constitute an equitable estoppel, the party's acts must be such that their assertion would operate as a fraud upon those who were affected thereby; *Watkins v. Peck*, 35 N. H. 97; *Adlin v. Gore*, 41 id. 465; *Whittaker v. Williams*, 20 Conn. 198; thus it is held that where a person pretends to be the owner of a steamboat, he cannot stand by and see persons making repairs thereon on his responsibility, and then afterward turn around and deny his ownership. His silence operates as an estoppel; *Camery v. Clark*, 13 La. Ann. 313; *Hailey v. Franks*, 18 id. 559.

So where a person sees his promissory note being sold to another for a valuable consideration, he is estopped from setting up any defenses, equitable or otherwise, of which he was aware at the time, unless he gives notice of such defenses at the time, and before the note was purchased. *Dicker v. Eisenhauer*, 1 Penn. St. 476; *Tyler v. Yates*, 3 Barb. (N. Y.) 222.

The general principle underlying this branch of the law was very concisely given in *Hall v. Fisher*, 9 Barb. (N. Y.) 17, thus: "*If a person maintain silence when in good conscience he ought to speak, equity will debar him from speaking when conscience requires him to be silent.*"

This will generally be found a perfect test to determine when a person is estopped by his silence or his acts, for the rule is applicable in either case, and no better test could be given.

putting on the record any matter of evidence, however conclusive. But the point having been expressly raised on demurrer to a replication, in a case of *Sanderson v. Collman*,¹ was unanimously overruled by the Court of Common Pleas. Tindal, C. J., there said, "If we find upon the record a fact which would have entitled the plaintiffs to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter in pais. If by the last branch is meant only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined. * * * * Lord Coke, speaking of estoppel by matter in pais, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence; but looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury." And Coltman, J., adds, "The meaning of the rule, I apprehend, is that a party shall not plead facts from which another fact, material to the issue, is to be *inferred*. * * * * I think that, if a party has a legal defense to that which is set up against him, he cannot be precluded from pleading such defense." There is, however, this great distinction between estoppels by record or by deed and estoppels in pais, namely, that the former must, in order to make them binding, be pleaded, *if there be an opportunity*, otherwise the party omitting to plead the estoppel waives it, and leaves the issue at large, on which the jury may find according to the truth; while with respect to estoppels in pais, they

¹ *Sanderson v. Collman*, 4 Man. & Gr. 209. See ad id. *Hallifax v. Lyle*, 3 Exch. 446.

need not, at least in most cases, be pleaded in order to
 [* 682] *make them obligatory.' Thus, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he had made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract.' This distinction is said not to be recognized in America; and it has been objected to on the ground that it appears inconsistent that the principle of the authority of *res judicata* should govern the decision of a *court*, when the matter is referred to them by pleading the estoppel, but that a *jury* should be at liberty to disregard this principle altogether; and that the operation of such an important principle as that of *res judicata* should depend upon the technical forms of pleading in particular actions.' But the distinction is not without reason. Where a party intends to conclude another by an estoppel, he ought to give him an opportunity of deliberately replying to it, and not spring it upon him at *Nisi Prius*. With due notice the adversary might be able to show that the matter relied on as an estoppel was not such in reality, as not relating to the property or transaction in controversy; or, if it were, that its effect had been removed by matter subsequent, as, for instance, that the party pleading the estoppel had by some other proceeding concluded him-

¹ *Freeman v. Cooke*, 2 Exch. 654, 662; 1 Wms. Saund. 325 a, n. (d), 6th Ed.; 2 Smith, Lead. Cas. 672, 707, 709, 5th Ed.; *Treviban or Trevioan v. Lawrence*, 2 Lord Raym. 1036 and 1048; 1 Salk. 276; *Magrath v. Hardy*, 4 Bingh. N. C. 782; *Lord Feversham v. Emerson*, 11 Exch. 385.

² *Freeman v. Cooke*, 2 Exch. 654, 662.

³ 1 Greenl. Ev. § 531, 7th Ed.

⁴ Ph. & Am. Ev. 512.

self from taking the objection,—estoppel against estoppel setting the matter at large;¹—or, when the estoppel relied on is a judgment, that that judgment was reversed on error, or deprived of binding force by an act of parliament, &c. The willfully keeping back an estoppel is not * only evidence of unfair dealing and a desire to surprise; but the divesting it of its conclusive [* 683] effect is a just punishment on the party who has unnecessarily called the jury together, and wantonly occasioned the expense of a trial. It may be asked why then are estoppels by matter in pais conclusive on the jury, seeing that they may be pleaded? That is probably a remnant of the old notion that matters in pais were matters of notoriety to the jury coming de vicineto,² who, therefore, ought not to be required to find against their personal knowledge; whereas deeds and judgments are dead proof;³ the former of which were supposed to lie in the peculiar knowledge of the witnesses, and the latter being on record in the courts.

*Whether “Allegans suam turpitudinem non est audiendus”
is a maxim of the common law.*

§ 545. Before dismissing the subject of estoppel, we would direct attention to the question, whether the maxim of the *civil* law, “Allegans suam turpitudinem (or suum crimen) non est audiendus,” is, or ever was, a maxim of the *common* law. Littleton⁴ puts the following case, “If a man be disseized, and the disseizor maketh a feoffment to divers persons to his use, and the disseizor continually taketh the profits, &c., and the disseizee release to him all actions reals, and after he

¹ *Suprà*, § 537.

³ Bk. 1, pt. 2, § 119.

² See *suprà*, § 543.

⁴ Sect. 499.

sueth against him a writ of entry in nature of an assize by reason of the statute, because he taketh the profits, &c. Quære, how the disseizor shall be aided by the said release; for if he will plead the release generally, then the demandant may say that he had nothing in the freehold at the time of the release made; and if he plead the release specially, then he must acknowledge a disseizin, and then may the demandant enter into the land, &c., by his acknowledgment of the disseizin, &c. But peradventure, by special pleading he may bar him of the action which he sueth, &c., though the demandant [* 684] * may enter." Sir Edward Coke,¹ in commenting on the words "he must acknowledge a disseizin," gives the following case: — "In a writ of dower the tenant pleaded that before the writ purchased, A. was seized of the land, &c., until by the tenant himself he was disseized, and that hanging the writ, A. recovered against him, &c.; judgment of the writ, and adjudged a good plea, in which the tenant confessed a disseizin in himself." For this is cited 15 Edw. IV. 4 B.,² and correctly, except that instead of "recovered against him," it should be "re-entered upon him." There are some other cases in the Year Books to the same effect. Thus in the 5 Edw. IV. 5 B. pl. 23, in a *præcipe quod reddat*, the tenant showed that long before the writ purchased, one H. was seized until disseized, by him, and that H. entered hanging the writ, judgment of the writ, and adjudged good plea as was said; the reporter, however, adding, "*Sed non interfui.*" And in the case already cited from the 15 Edw. IV., Littleton himself is reported to have put this case, which, however, goes much beyond the others, "If I disseize P. and levy a fine to

¹ Co. Litt. 287 a.

² Pl. 7.

you, and then P. enters upon you, and enfeoffs me, and you enter on me, and I bring an assize, and you plead the fine in bar, I may avoid the fine by the matter aforesaid, so a man may take advantage of his wrong done by himself," &c. But, on the other hand, Sir Edward Coke either forgot these authorities and the passage in his own first Institute, or he supposed some distinction between pleading and evidence as to the principle in question; for in the 4 Inst. 279, when speaking of witnesses, he lays down the maxim in its terms, "*Allegans suam turpitudinem non est audiendus*;" but only cites for it a case of *Rich. de Raynham*, in the C. P. in 15 Edw. I. But in *Collins v. Blantern*,¹ in 1767, which has become a leading *case,² it was held that to an action on a bond [* 685] the defendant may plead that it was given by him for an illegal and corrupt consideration. In *Lutterell v. Reynell*,³ T. 29 Car. II., which was an action of trespass for taking money, on its being excepted against the plaintiff's evidence, that if it were true it destroyed the plaintiff's action, inasmuch as it amounted to prove the defendant guilty of felony; it was, says the reporter, "agreed that it should not lie in the mouth of the party to say that himself was a thief, and therefore not guilty of the trespass." On the trial of Titus Oates for perjury in 1685,⁴ the court rejected the testimony of a person who came to swear that he had, by persuasion of the defendant, perjured himself on a former occasion; Lord Chief Justice Jefferies pronouncing such evidence to be "very

¹ 2 Wils. 341.

² See that case and the note to it, 1 Smith, L. C. 310, 5th Ed.

³ 1 Mod. 282.

⁴ 10 Ho. St. Tr. 1079, 1185, 6.

nauseous and fulsome in a court of justice." So on the trial of Elizabeth Canning for perjury, in 1754,¹ on the question being raised, Legge, B., said, "I believe witnesses have very often been called, that have declared they have been perjured in other instances; but I will never admit or suffer a person that will say they have been perjured in another affair, and I knew it before they were sent for. When she (*i. e.*, the witness) swears true I cannot tell; but that she has sworn false once, I must know." On counsel observing that in the case of subornation of perjury such were admitted every day, Legge, B., answered, "they are admitted, but it goes so much to their credit." The recorder (Moreton) expressed a similar opinion, and referred to the case of *Titus Oates*. It is very difficult indeed to see a distinction in this respect between perjury and subornation—why an avowal of perjury on a former occasion should be an objection to competency in the one case, and only to credit in the other. The maxim *in question was cited by [* 686] Lord Mansfield as a maxim of the civil law in *Walton v. Shelley*,² in 1786, which case was afterward overruled.³ It has likewise been referred to in some others,⁴ but the decisions in such of them as can be supported would stand very well without it—most, if not all, proceeding on the unimpeachable principle that a man shall not be allowed to take advantage of his own guilt, wrong, or fraud.⁵

¹ 19 Ho. St. Tr. 283, 632, 633.

² 1 T. R. 296, 300.

³ *Jordaine v. Lashbrook*, 7 T. R. 601.

⁴ *Gibson v. Minet*, 1 H. Bl. 569, 597, per Gould, J.; *Findon v. Parker*, 7 Jurist, 903, 907; *Steadman v. Duhamel*, 1 C. B. 888, 889; *Mann v. Swann*, 14 Johns. 269, 273; *U. S. v. Leffler*, 11 Peters, 86 & 94.

⁵ *Infra*.

§ 546. The modern authorities completely negative the existence of any such rule, so far as witnesses are concerned. It is now undoubted law that a witness, although not always bound to *answer* them, may be *asked* questions tending to criminate, injure, or degrade him.¹ So, it is the constant practice in criminal cases to receive the evidence of accomplices who depose to their own guilt as well as to that of the accused ; and it is not even indispensable, although customary and advisable, that some material part of the story told by the accomplice should be corroborated by untainted evidence.² The cases of *Titus Oates* and *Elizabeth Canning*, the chief authorities in favor of the maxim, were expressly overruled by the Court of King's Bench in *R. v. Teal*.³ That was a prosecution against Thomas Teal, Hannah S. and others for conspiring falsely to charge the prosecutor with being the father of a bastard child of Hannah S. A nolle prosequi having been entered as to Hannah S., she was examined as a witness to prove that she had, at the instigation of the defendant Teal, forsworn herself in deposing that the prosecutor was father of the child. A new trial * being moved for on the ground that she was an incompetent witness, those cases were relied [* 687] on ; and it was also argued that a person who admits himself to be an infidel is disqualified from giving evidence. The court, however, took a different view ; and Lord Ellenborough said, "An infidel cannot admit the obligation of an oath at all, and cannot, therefore, give evidence under the sanction of it. But, though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow

¹ Bk. 2, pt. 1, ch. 1.

² 11 East, 307.

³ Bk. 2, pt. 1, ch. 2, § 171.

that he can never afterward feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would be no warrant for the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide." In the subsequent case also, of *Rands v. Thomas*,¹ which was an action for goods furnished to a ship, the plaintiff, in order to show the defendant to be a part-owner, proved that his name was upon the register as such, and also that, after the time when the goods were furnished, he had executed a bill of sale of his share to one Cooke; on whose oath the register was obtained, and he was stated in it to be a part-owner. The defendant proposed to call Cooke, to prove that he had inserted the defendant's name in the register without his privity or consent, on which it was objected that Cooke could not contradict the oath he had taken at the time of the registry. Graham, B., acceded to this view, and rejected the evidence; but the court set aside the verdict, on the authority of *R. v. Teal*, holding that the objection went only to the credit of the witness. So it is competent for a defendant, who is sued on a contract, to plead and prove that, as between him and the plaintiff, such contract was illegal or immoral;² but not that it was [* 688] *merely fraudulent.³ For although a man may in a court of justice acknowledge his own wrong or fraud, it is a principle of law that he shall not be

¹ 5 M. & S. 244.

² *Holman v. Johnson*, Cowp. 341, 343.

³ *Jones v. Yates*, 9 B. & C. 532, 538.

allowed to take advantage of it¹ — “Nullus commodum capere potest de injuriâ suâ propriâ.”²

SECTION III.

SELF-DISSERVING STATEMENTS IN CRIMINAL CASES.

§ 547. We come lastly to self-disserving statements in criminal cases; or, as they are most usually termed, “confessions.” In treating this subject, we propose to consider:

1. Estoppels in criminal cases.
2. The admissibility and effect of extra-judicial self-criminative statements.
3. Infirmative hypotheses affecting self-criminative evidence.

SUB-SECTION I.

ESTOPPELS IN CRIMINAL CASES.

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Estoppels in criminal cases — Judicial confession.

§ 548. In this branch of the law there are, for obviously just reasons, few estoppels. The first and most *important is the estoppel by judicial confession. [* 689] It may be taken as a rule of universal jurisprudence that a confession of guilt, made by an accused person to a judicial tribunal having jurisdiction to con-

¹ 1 Blackst. Comm. 443; Co. Litt. 148 b; 2 Ins. 713; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Doe d. Roberts v. Roberts*, 2 B. & A. 367; *Doe d. Bryan v. Bancks*, 4 Id. 401, 409, per Best, J.; *Daly v. Thompson*, 10 M. & W. 309; *Fendon v. Parker*, 11 Id. 675, 681; *Murray v. Mann*, 2 Exch. 538.

² Co. Litt. 148 b; Jenk. Cent. 4, Cas. 5. See Dig. lib. 50, tit. 17, l. 134.

demn or acquit him, is sufficient to found a conviction,¹ even where it may be followed by sentence of death ; such confession being deliberately made, under the deepest solemnities, oftentimes with the advice of counsel, and always under the protecting caution and oversight of the judge.² “*Confessus in judicio pro judicato habetur, et quodammodo suâ sententiâ damnatur.*”³ “*Confessio facta in judicio omni probatione major est.*”⁴ “*Confessio in judicio est plena probatio.*”⁵ Still, if the confession appears incredible, or any legal inducement to confess has been held out to the accused, or if he appears to have any object in making a false confession, or if the confession appears to be made under any sort of delusion, or through fear and simplicity,⁶ the court ought not to receive it. So, if the offense charged is one of the class denominated “*facti permanentis*,” and no other indication of a *corpus delicti* can be found,⁷ &c. The numerous instances which have occurred of the falsity of confessions, judicial as well as extra-judicial,⁸ traces of which are visible very early in our legal history,⁹ fully justify this course. In ordinary practice a plea of guilty is never recorded by English judges, at least in serious cases, without first solemnly warning the accused that it

¹ 1 Greenl. Ev. § 216, 7th Ed. ; Tayl. Ev. § 792, 4th Ed. ; Dig. lib. 42, tit. 2 ; Cod. lib. 7, tit. 59 ; Mascard. de Prob. Concl. 344, 345 ; Ayliffe, Parerg. Jur. Can. Angl. 545 ; 2 Hagg. Cons. Rep. 315 ; 1 Ev. Poth. § 798.

² Greenl. in loc. cit.

³ 11 Co. 80 a. Acc. Cod. lib. 7, tit. 59 ; Dig. lib. 42, tit. 2, l. 1 ; Id. lib. 9, tit. 2, l. 25, § 2.

⁴ Jenk. Cent. 2, Cas. 99.

⁵ Jenk. Cent. 3, Cas. 73.

⁶ Finch's Law, 29 ; Ayliffe, Parerg. Jur. Can. Angl. 545.

⁷ See *suprà*, ch. 2, sect. 3, sub-sect. 2, § 441.

⁸ See *infra*, sub-sect. 3.

⁹ 27 Ass. pl. 40 ; 22 Ass. pl. 71.

will not entitle him either to mercy or a *mitigated sentence, and freely offering him leave to [* 690] retract it and plead not guilty.' For it is important to observe that the plea of not guilty by an accused person is not to be understood as a moral asseveration of his innocence of the offense with which he is charged; it means no more than that he avails himself of the undoubted right vested in him by law of calling on the prosecution to prove him guilty of that offense.(a)

¹ 2 Hale, P. C. 225.

(a) The confession of a person charged with a crime, made freely and voluntarily, without any hope or promise of benefit or advantage, may be given in evidence against him; *State v. Phelps*, 11 Vt. 116; *State v. Walker*, 34 id. 296; *Morrison v. State*, 5 Ohio, 438; *O'Brien v. People*, 48 Barb. (N. Y.) 127; *Com. v. Domer*, 4 Allen (Mass.), 297; *Hartung v. People*, 4 Park. Cr. (N. Y.) 319; *State v. Kirby*, 1 Strobb. (S. C.) 155; *Rafe v. State*, 20 Ga. 60; *People v. Fowler*, 18 How. Pr. (N. Y.) 493; *People v. Wentz*, 37 N. H. 303; *State v. Kitty*, 12 La. Ann. 805; *Hamilton v. State*, 3 Ind. 552; *Meyer v. State*, 19 Ark. 156; *Com. v. McGown*, 2 Pars. (Penn.) 568; *Dick v. State*, 30 Miss. 593; *State v. Squires*, 48 N. H. 364; but if made through the influence of hope or fear, they will not be received; *Miller v. State*, 40 Ala. 54; *Com. v. Taylor*, 5 Cush. (Mass.) 605; *State v. Walker*, 34 Vt. 296; *Miner v. People*, 39 Ill. 457; *State v. Guild*, 10 N. J. 163; *Smith v. State*, 10 Ind. 106; *Com. v. Harmon*, 4 Penn. St. 269; *Boyd v. State*, 2 Humph. (Tenn.) 39; *Stephen v. State*, 11 Ga. 225; *McGlothlin v. State*, 2 Cold. (Tenn.) 223; *People v. Phillips*, 42 N. Y. 200; *Austin v. State*, 51 Ill. 236; *Frain v. State*, 40 Ga. 429; *State v. Brockman*, 46 Mo. 566; *Flannigan v. State*, 25 Ark. 92; *State v. Staley*, 14 Minn. 103; but facts thus discovered may be proved; *Duffy v. People*, 26 N. Y. 588; *State v. Motley*, 7 Rich. 327; *Sarah v. State*, 28 Ga. 576; *State v. Cowan*, 7 Ired. (N. C.) 230; *People v. Ah Ki*, 20 Cal. 177; *Gates v. People*, 14 Ill. 433; *Frederick v. State*, 3 W. Va. 695; *People v. Hoy Ten*, 34 Cal. 176; *Jane v. Com.*, 2 Metc. (Ky.) 30; or if made when the party is not, but is led to believe, that he is under oath, his confession is not admissible; *Shaffler v. State*, 3 Wis. 823; *U. S. v. Williams*, 1 Cliff. (U. S.) 5; and the prosecution must show that it was voluntary before it can be given in evidence. *Thompson v. Com.*, 20 Gratt. 724.

But the whole of a confession must be proved. The State will not be permitted to give detached portions of it. It must be given entire, as well that which makes *for* the prisoner as that which makes *against* him, and the jury must give as much credit to one part as another, unless there is proof to corroborate one part and none to corroborate the other; *People v. Gilahent*, 39

Pleading.

§ 549. 2. An accused person must plead the different kinds of pleas in their regular order — by pleading in bar he loses his right to plead in abatement, &c.¹

¹ 2 Hale, P. C. 175; *Cook's case*, 5 Ho. St. Tr. 1143.

Cal. 663; *Crawford v. State*, 4 Cold. (Tenn.) 190; *Williams v. State*, 39 Ala. 532; *Griswold v. State*, 24 Wis. 144; *State v. Worthington*, 64 N. C. 594; and where the confession is in writing, the written confession must be used, and parol evidence in reference thereto is not admissible. *State v. Johnson*, 10 La. Ann. 456; *State v. Johnson*, 5 Harr. (Del.) 507.

The confession of a prisoner is not held as conclusive evidence of his guilt, however voluntarily and freely it may have been made. It is merely evidence to go to the jury to be weighed by them in view of all the facts proved at the trial; *People v. Ruloff*, 3 Park. Cr. (N. Y.) 401; *State v. Jenkins*, 2 Tyler (Vt.), 377; *Donnelly v. State*, 26 N. J. 463, *Barnes v. Allen*, 30 Barb. (N. Y.) 663; and unless corroborated by proof outside the confession, either from witnesses or circumstances that leave no reasonable doubt in the minds of the jury as to its truth, it would be error for the jury to convict the prisoner. The law looks with suspicion upon all such evidence, and will not allow a prisoner to be convicted on his naked, uncorroborated confession. *State v. Scott*, 39 Mo. 424; *People v. Ruloff*, *ante*; *Brown v. State*, 32 Miss. 433; *Bergen v. People*, 17 Ill. 426; *State v. Fields, Peck* (Tenn.), 140; *Selvridge v. State*, 30 Texas, 20; *State v. Symonds*, 57 Me. 148.

But this degree of caution is more applicable to capital cases than to ordinary felonies. In an ordinary felony, or in a trial for a misdemeanor, a conviction would be allowed upon the naked confession of the prisoner, but in a capital case the highest degree of caution is justly observed, and such evidence, although admissible, is looked upon with distrust; *State v. Fields, Peck* (Tenn.), 140; *Bergen v. People*, 17 Ill. 426; *People v. Badgeley*, 16 Wend. (N. Y.) 53; *People v. Ruloff*, 3 Park. Cr. (N. Y.) 401; *State v. Lamb*, 28 Mo. 218; as to larceny; *State v. Phelps*, 2 Root (Conn.), 87; *Com. v. Howe*, 2 Allen (Mass.), 153; *Ward v. People*, 3 Hill (N. Y.), 395; as to misdemeanors; *State v. Gilbert*, 36 Vt. 145; bigamy; *Cayford's Case*, 7 Me. 57.

In reference to confessions made by children under twelve years of age, the rule is, that the confession may be received if the child is shown to be competent to understand the nature of, and has sufficient capacity to make, a confession; *State v. Aaron*, 4 N. J. 231. But in a later case in New Jersey, *State v. Gould*, 10 N. J. 163, it was held that the court would presume that a child twelve years and five months of age, who was competent to commit a crime, is competent to confess it. But this is a mere presumption which may be disproved if possible. It is proper to say that in all cases, all the circumstances

Collateral matters.

§ 550. 3. An accused person may be estopped by various collateral matters which do not appear on record. Thus he cannot challenge a juror after he has been sworn,¹

¹ 2 Hale, P. C. 293.

under which the confession of a prisoner are made should be closely and carefully scrutinized, and if there is any thing to excite a suspicion even that it is not wholly voluntary, it should be rejected, and courts often exercise this discretion in the higher class of offenses. *State v. Peter*, 14 La. Ann. 521.

As to the admissibility of evidence upon a coroner's jury, or on his own examination, given by a person on trial for murder, there is considerable conflict. In some cases it is held that the confessions of a party made under oath, while giving evidence as a witness, are not only admissible as evidence against him, but that they are sufficient to sustain a conviction though not corroborated; *Anderson v. State*, 26 Ind. 89; *Williams v. Com.*, 29 Penn. St. 102; *People v. Thayers*, 1 Park. Cr. (N. Y.) 595; *Hendrickson v. People*, 10 N. Y. 13; *State v. Broughton*, 7 Ired. (N. C.) 96; while in other cases it is held that the confessions of a prisoner taken under oath before a committing magistrate cannot be used against him; *United States v. Bascadore*, 2 Cranch (U. S. C. C.), 30; *United States v. Charles*, 1 id. 164; *Com. v. Harman*, 4 Penn. St. 269; but if the evidence was given under circumstances that would render it admissible if given in the form of a confession, it would be admissible; *Alfred v. State*, 2 Swan. (Tenn.) 581; *State v. Lamb*, 28 Mo. 218; *Peter v. State*, 12 Miss. 31; *Teachout v. People*, 41 N. Y. 7; but if the prisoner goes upon the witness stand he may be contradicted by the production of testimony previously given by him, and in all cases it is for the court to say whether the confessions or statements of a prisoner were made under such circumstances as to make them admissible; *Whaley v. State*, 11 Ga. 123; *Cain v. State*, 18 Tex. 387; *Simon v. State*, 5 Fla. 285; *Hudson v. Com.*, 2 Duv. (Ky.) 531; *State v. Ostrander*, 18 Iowa, 435; and in determining this question it will always consider whether the circumstances under which it was given were such as to affect its reliability as evidence of the facts which it contains. *State v. Freeman*, 12 Ind. 100.

The rule in reference to evidence of confessions seems to be that, in order to render them admissible as evidence, they should be *free and voluntary*, and not induced by *fear* on the one hand or *hope of personal benefit* on the other. *State v. Grant*, 22 Me. 171; *Com. v. Taylor*, 5 Cush. (Mass.) 606.

"The ground on which confessions made by a party accused," says Chief Justice Shaw, in *Com. v. Morey*, 1 Gray (Mass.), 162, "are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, for the purpose of realizing the promised

unless it be for cause arising afterward ;¹ if he challenges a juror for cause, he must show all his causes together ;² and on a trial for high treason, if he means to object to

¹ Hob. 235.

² 2 Hale, P. C. 274.

relief, or avoid the threatened danger ; and, therefore, admissions so obtained have no just or legitimate tendency to prove the facts admitted."

Mr. Wills, in his work on Circumstantial Evidence, p. 69, *et sequitur*, gives numerous instances of the unreliability of confessional evidence, from which we have selected the following :

"By the law of England," says he, "a voluntary and unsuspected confession is clearly sufficient to warrant conviction, wherever there is independent proof of the *corpus delicti*. According to some authorities, confession alone is a sufficient ground for conviction, even in the absence of any such independent evidence ; but the contrary opinion is most in accordance with the general principles of reason and justice, the opinions of the best writers on criminal jurisprudence, and the practice of other enlightened nations. Nor are the cases adduced in support of the doctrine in question very decisive, since in all of them there appears to have been some evidence, though slight, of confirmatory circumstances, independently of the confession.

"Judicial history presents innumerable warnings of the danger of placing implicit dependence upon this kind of self-condemnatory evidence, even where it is exempt from all suspicion of coercion, physical or moral, or other sinister influence. How greatly then must such danger be aggravated, where confession constitutes the only evidence of the fact of a *corpus delicti* ; and how incalculably greater in such cases is the necessity for the most rigorous scrutiny of all collateral circumstances which may actuate the party to make a false confession ! The agonies of torture, the dread of their infliction, the hope of escaping the rigors of slavery or the hardships of military service, a weariness of existence, self-delusion, the desire to shield a guilty relative or friend from the penalties of justice, the impulses of despair from the pressure of strong and apparently incontrovertible presumptions of guilt, the dread of unmerited punishment and disgrace, the hope of pardon, these and numerous other inducements have not unfrequently operated to produce unfounded confessions of guilt.

"Innumerable are the instances on record of confession, extracted, 'by the deceitful and dangerous experiment of the criminal question,'³ Gibbon's Decline and Fall, ch. xvii, of offenses which were never committed, or not committed by the persons making confession. Jardine on the Use of Torture in the C. L. of England, 3, 6 ; and see Fortescue De Laudibus Legum Angliæ, ch. 22. Nor have such instances been wanting in other parts of Europe, even in the present century.

"When Felton, upon his examination at the council board, declared, as he had always done, that no man living had instigated him to the murder of the

a witness as misdescribed in the list of witnesses delivered under the 7 Ann. c. 21, and 6 Geo. 4, c. 50, he must take the objection on the *voir dire*; for it comes too late

Duke of Buckingham, the Bishop of London said to him, 'if you will not confess you must go to the rack.' The man replied, 'if it must be so, I know not whom I may accuse in the extremity of the torture, Bishop Laud, perhaps, or any lord at this board.' 1 Rushworth's Collections, 688. 'Sound sense, observed the excellent Sir Michael Foster, 'in the mouth of an enthusiast and a ruffian.' Foster's C. L. 244, 3d ed.

"Not less repugnant to policy, justice, and humanity, is the moral torture to which in some (perhaps in most) of the nations of Europe, persons suspected of crime are subjected, by means of searching, rigorous, and insidious examinations, conducted by skillful adepts in judicial tactics, and accompanied sometimes even by dramatic circumstances of terror and intimidation. See the case of Riembaur, a Bavarian priest, charged with murder, in *Narratives of Remarkable Criminal Trials*, by Feuerbach, *ut supra*.

"Lord Clarendon gives a circumstantial account of the confession of a Frenchman named Hubert, after the fire of London, that he had set the first house on fire, and had been hired in Paris a year before to do it. 'Though,' says he, 'the lord chief justice told the king that 'all his discourse was so disjointed he did not believe him guilty,' yet upon his own confession the jury found him guilty, and he was executed accordingly:' the historian adds, 'though no man could imagine any reason why a man should so desperately throw away his life, which he might have saved though he had been guilty, since he was accused only upon his own confession, yet neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch, weary of life, and chose to part with it this way.' 3 *Life and Continuation*, etc. 94 (Clarendon, ed. 1824); and see 2 *Mem. of Romilly*, 182, where it is stated that an innocent man was executed erroneously by the sentence of a court-martial, on a charge of mutiny.

"A very remarkable case of this nature was that of the two Boons, convicted in the supreme court of Vermont in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them, and that one of them struck him a violent blow on the back of the head, with a club, which felled him to the ground. Some suspicions arose, at that time, that he was murdered: which were increased by the finding of his hat in the same field a few months afterward. These suspicions in process of time subsided: but in 1819, one of the neighbors having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehe-

after the witness has been sworn in chief.¹ In the case of *R. v. Frost*,² which was an indictment for high treason, where the list of witnesses required by those statutes was

¹ *R. v. Frost*, 9 C. & P. 129, 183.

² 9 C. & P. 162 and 187.

mently-accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field; and in a hollow stump, not many rods from it, were discovered two nails and a number of bones believed to be those of a man. Upon this evidence, together with the deliberate confession of murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment; which as to one only of them was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of an animal. The prisoners had been advised by some misjudging friends, that as they would certainly be convicted, upon the circumstances proved, their only chance for life was by a commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. 1 Greenl. L. of Ev., § 214; and see the case of the Perry's, *infra*, and an American case in Wharton's C. L. of the U. S. 315.

"The State trials contain numerous confessions of witchcraft, and abound with absurd and incredible details of communications with evil spirits, which only show that the parties were either impostors or the involuntary victims of invincible self-delusion. One kind of false confession, that namely of being a deserter, is so common as to have been made the subject of penal repression by rendering the offender liable to be treated as a rogue and vagabond, and to be imprisoned for any period not exceeding three months. Stat. 20 Vict. 13, c. 49.

"A distinguished foreign lawyer well observes, that 'whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked or so urged by the accused's counsel as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such a use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic, and should be regarded as offensive to the intelligence both of the court and jury.' 1 Hoffman's Course of Legal Study, 367.

"It is essential to justice that a confessional statement, if it be consistent, probable, and uncontradicted, should be taken together, and not distorted, or but partially adopted. 'It is a rule of law,' said Lord Ellenborough, 'that

not delivered in the manner therein prescribed — *i. e.*, simultaneously with the copy of the indictment and jury panel, it was held, on a case reserved, by nine judges

when evidence is given of what a party has said or sworn, all of it is evidence (subject to the consideration of the jury, however, as to its truth), coming, as it does, in one entire form before them; but you may still judge to what parts of the whole you can give credit; and also whether that part which appears to confirm and fix the charge does not outweigh that which contains the exculpation.' *Rex v. Lord Cochrane* and others, *Gurney's Rep.* 479. On the trial of a man for a murder committed twenty-four years before, the principal inculpatory evidence consisted of his confession, which stated in substance that he was present at the murder, but went to the spot without any previous knowledge that a murder was intended, and took no part in it. It was urged that the prisoner's concurrence must be presumed from his presence at the murder, but Mr. Justice Littledale held that the statement must be taken as a whole; and that so qualified, it did not in fairness amount to an admission of the guilt of murder; *Rex v. Clewes*, 4 C. & P. 221, and *Short-hand Rep.*; and where the prisoner's declaration, in which she asserted her innocence, was given in evidence, and there was evidence of other statements confessing guilt, the judge left the whole of the conflicting statements to the jury for their consideration. But where there is, in the whole case, no evidence but what is compatible with the assertion of innocence, adduced in evidence for the prosecution, the judge will direct an acquittal. *Rex v. Jones*, 2 C. & P. 629. In the case of *Strahan and Paul*, it was unsuccessfully contended that the admission made by the prisoner Strahan must be taken to the whole extent to which it was made, and that it would then fairly and reasonably lead to the conclusion that he had known nothing of the fraudulent transactions in which the other prisoner was the leading actor in March, 1854; but Mr. Baron Alderson told the jury that they were not bound to believe either the whole or any part of the statement made by the prisoner Strahan, and that they must take it with this consideration as one of the circumstances of the case and no more.

"Of the credit and effect due to a confessional statement the jury are the sole judges, and if it is inconsistent, improbable, or incredible, or is contradicted or discredited by other evidence, or is the emanation of a weak or excited state of mind, the jury may exercise their discretion in rejecting it, either wholly or in part, whether the rejected part make for or against the prisoner. *Rex v. Higgins*, 3 C. & P. 603; *Rex v. Steptoe*, 4 *id.* 397; 1 *Greenleaf's L. of Ev.*, § 218. On the trial of a man for setting fire to a stack of hay, it appeared that between two and three o'clock in the morning a police constable attracted by the cry of fire went to the spot, close to which he met the prisoner, who told him that a haystack was on fire, and that he was going to London; the policeman asked him to give information of the fire to any other policeman he might meet, and request him to come and assist. Shortly afterward, on his way toward London, the prisoner met a serjeant of police whom he

against six, that the objection came too late after the jury had been sworn and the indictment opened to them.

informed of the fire, stating that he was the man who set the stack on fire, upon which he was taken into custody. The serjeant of police, on cross-examination by the prisoner, stated that the magistrates entertained an opinion that he was insane, and directed inquiries to be made, from which it appeared that he had before been charged with some offense and acquitted on the ground of insanity. When apprehended, the prisoner appeared under great excitement; and upon his trial he alleged that he had been confined two years in a lunatic asylum, and had been liberated only about a year ago; that his mind had been wandering for some time; and that passing by the place at the time of the fire, he was induced, in a moment of delirium, to make this groundless charge against himself. He begged the court to explain to the jury the different result that would follow from his being acquitted on the ground of insanity, and an unconditional acquittal; and said that rather than the former verdict should be returned, which would probably have the effect of immuring him in a lunatic asylum for the rest of his life, he would retract his plea of not guilty, and plead guilty to the charge. Mr. Justice Williams, in summing up, remarked that there did not appear to be the least evidence against the prisoner except his own statement; and that it was for the jury to say under all the circumstances whether they believed that statement was founded in fact, or whether it was, as the prisoner alleged, merely the effect of an excited imagination and weak mind. The prisoner was acquitted. *Reg. v. Wilson*, Maidstone Wint. Ass., 1844. The same doctrine was held by L. C. J. Wilde, in a case of arson at Maidstone Spring Assizes, 1847, where the prisoner, to conceal his disgrace, refused to give his name.

"It is obvious that every caution observed in the reception of evidence of a direct confession ought to be more especially applied in the admission and estimation of the analogous evidence of statements which are only indirectly in the nature of confessional evidence; since such statements, from the nature of the case, must be ambiguous, or relate but obscurely to the *corpus delicti*. 'Hasty confessions,' says Sir Michael Foster, 'made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction, and withal this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted.' Foster's C. L. 243; and see Greenl. L. of Ev., § 214. 'How easy is it,' it has been admirably said, 'for the hearer to take a word in a sense not intended by the speaker, and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner and action of the one who made the confession, how almost impossible it is to make third persons understand the exact state of his mind and meaning!

* SUB-SECTION II.

[* 691]

THE ADMISSIBILITY AND EFFECT OF EXTRA-JUDICIAL SELF-CRIMINATIVE STATEMENTS.

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Admissibility of extra-judicial self-criminative statements
— *Must be made voluntarily, or at least freely.*

§ 551. Self-disserving evidence is not always receivable in criminal cases as it is in civil. There is this condition precedent to its admissibility, that the party

For these reasons such evidence is received with great distrust and under apprehension for the wrong it may do.' In *Resp. v. Fields*, Peck's Rep. 140, quoted in 1 Taylor's L. of Ev. 689, 2d ed.

"Upon the trial of a man for the murder of a woman, who had been brutally assaulted by three men, and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the prisoner's name, from which circumstances suspicion attached to him. A person deposed that he met the prisoner at a public-house, and asked him if he knew the woman who had been so cruelly treated, and that he answered, 'Yes, what of that?' The witness said, that he then asked him if he was not one of the parties concerned in that affair: to which he answered, according to one account, 'Yes, I was; and what then?' or, as another account states, 'If I was, what then?' It appeared that the prisoner was intoxicated, and that the questions were put with a view of ensnaring him; but, influenced by this imprudent language, the jury convicted him, and he was executed. The real offenders were discovered about two years afterward, and two of them were executed for this very offense, and fully admitted their guilt; the third having been admitted to give evidence for the Crown. *Rex v. Coleman*, Kingston Spring Ass., 1748-9, and 1 Remarkable Trials, 162, 172; *Rex v. Jones and Welch*, 4 Celebrated Trials, 344.

"But in the most debased persons there is an involuntary tendency to truth and consistency, except when the mind is on its guard, and studiously bent upon concealment; and this law of our nature sometimes gives rise to minute

against whom it is adduced must have supplied it *voluntarily*, or at least *freely*. It is an established principle of English law that every confession or criminative state-

and unpremeditated acts of great weight. In the memorable case of Eugene Aram who was tried in 1759 for the murder of Daniel Clark, an apparently slight circumstance in the conduct of his accomplice, led to his conviction and execution. About thirteen years after the time of Clark's being missing, a laborer, employed in digging for stone to supply a lime-kiln near Knaresborough, discovered a human skeleton near the edge of the cliff. It soon became suspected that the body was that of Clark, and the coroner held an inquest. Aram and Houseman were the persons who had last been seen with Clark on the night before he was missing. The latter was summoned to attend the inquest, and discovered signs of uneasiness: at the request of the coroner he took up one of the bones, and in his confusion dropped this unguarded expression, 'this is no more Daniel Clark's bone than it is mine;' from which it was concluded, that if he was so certain that the bones before him were not those of Clark, he could give some account of him. He was pressed with this observation, and, after various evasive accounts, he made a full confession of the crime; and upon search, pursuant to his statement, the skeleton of Clark was found in St. Robert's Cave, buried precisely as he had described it. Life and Trial of Eugene Aram; and see Biog. Britt., article Eugene Aram.

"A remarkable fact of the same kind occurred in the case of one of three men convicted, in February, 1807, of a murder on Hounslow heath. In consequence of disclosures made by an accomplice, a police officer apprehended the prisoner four years after the murder, on board the 'Shannon' frigate, in which he was serving as a marine. The officer asked him, in the presence of his captain, where he had been about three years before; to which he answered, that he was employed in London as a day-laborer. He then asked him where he had been employed that time four years; the man immediately turned pale, and would have fainted away had not water been administered to him. These marks of emotion derived their weight from the latency of the allusion, no express reference having been made to the offense with which the prisoner was charged, and from the probability that there must have been some secret reason for his emotion connected with the event so obscurely referred to, particularly as he had evinced no such feeling upon the first question, which referred to a later period. *Rex v. Haggerty and others*, 6 Celebrated Trials, 19; and Sessions Papers, 1807.

"To this head may be referred the acts of concealment, disguise, flight, and other indications of mental emotion usually found in connection with guilt. See *Rex v. Crossfield*, 26 St. Tr. 216 *et seq.*; and *Rex v. O'Coigley*, 27 id. 138. By the common law flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods, whether he were found guilty or acquitted, Co. Litt. 375, and the officer always, until the abolition of the practice by statute 7 & 8 Geo. IV, cap. 28, s. 5, called

ment ought to be rejected, which has either been extracted by physical torture, coercion, or duress of imprisonment; or been made after any inducement to confess

upon the jury, after verdict of acquittal, to state whether the party had fled on account of the charge. These several acts in all their modifications are indications of fear; but it would be harsh and unreasonable invariably to interpret them as indications of guilty consciousness, and greater weight has sometimes been attached to them than they have fairly warranted. Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principles from which consistency springs; but it does not follow, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, that the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt; and every man is therefore entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty. Per Mr. Baron Gurney, in *Reg. v. Belaney, infra*. Mr. Justice Abbott, on a trial for murder where evidence was given of flight, observed, in his charge to the jury, that 'a person, however conscious of innocence, might not have courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight.' 'It may be,' added the learned judge, 'a conscious anticipation of punishment for guilt, as the guilty will always anticipate the consequences; but at the same time it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this is.' *Rex v. Donnell, infra*. The learned judge, in Professor Webster's case, said: 'Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon the charge of a crime so heinous, that who of us can say how an innocent or a guilty man ought or would be likely to act in such a case? or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected? or that a guilty man, who by knowledge of his danger might be somewhat braced up for the consequences, would always appear agitated or the reverse?' Bemis' Rep. 486.

"It is not possible to lay down any express test by which these various indications may be infallibly referred to any more specific origin than the operation of fear. Whether that fear proceeds from the consciousness of guilt, or from the apprehension of undeserved disgrace and punishment, and from deficiency of moral courage, is a question which can be judged of only by reference to concomitant circumstances. Prejudice is often epidemic, and there have been periods and occasions when public indignation has been so much and so unjustly aroused, as reasonably to deter the boldest mind from voluntary submission to the ordeal of a trial. The consciousness that appearances have been

has been held out to the accused, by, or with the sanction, express or implied, of any person having lawful authority, judicial or otherwise, over the charge against him, or over his person as connected with that charge. But in order to have this effect the inducement thus held out must be in the nature of a promise of favor or threat of punishment; *i. e.*, it must be calculated to convey to the mind of the accused that his condition, relative to the charge against him, will be rendered better or worse by his consenting or refusing to confess. If, therefore, it refers only to collateral advantages, as in the case of spiritual exhortations by a clergyman,¹ &c., the confession or criminative statement will be receivable; as it [* 692] also will when the *supposed influence of an illegal inducement to confess may fairly be presumed to have been dissipated, before the confession, by

¹ *R. v. Gilham*, 1 Moo. C. C. 186; *R. v. Wild*, Id. 452.

suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct apparently incompatible with innocence, and drawn down the unmerited infliction of the highest legal penalty. The inconclusiveness of these circumstances is strikingly exemplified by a case mentioned in a preceding page, where the magistrate was so fully convinced of the prisoner's innocence that he allowed him to go at large on bail to appear at the assizes. The coroner's inquest having brought in a verdict of 'guilty' against him, he endeavored to escape from the danger of a trial in the excited state of public feeling by flight; but was subsequently apprehended, convicted, and executed on a charge of murder, of which he was unquestionably guiltless. *Rex v. Coleman*, *ante*, 77; and see the case of Green and others, 14 St. Tr. 1369, where several persons, one of whom had voluntarily surrendered, were convicted in Scotland and executed, at a period of great excitement against Englishmen, upon a groundless charge of piracy and murder.

"In the endeavor to discover truth, no evidence should be excluded; but a case must be scanty of evidence which demands that importance should be attached to circumstances so fallacious as the acts in question. It has been observed that if the evidence without them is sufficient, this species of evidence is unnecessary, and that if not, then the inferences from language, conduct, and behavior, seems not of sufficient weight to give any conclusive effect to the other proofs." Per Shaw, C. J., in *Prof. Webster's case*, Rep. *ut supra*, 487.

a warning, from a person in authority, not to pay any attention to it.¹ (a) The cases on the subject of what is an illegal inducement to confess are very numerous, and far from consistent with each other;² and there can be little doubt that the salutary rule which excludes confessions unlawfully obtained has been applied to the rejection of many not coming within its principle.³ All questions relating to the admissibility of extra-judicial confessorial statements are, of course, to be decided by the judge. Where, on a confession being offered in evidence, it appeared that an illegal inducement to confess had been held out, but the answers of the witness were confused and contradictory as to whether that was before or after the confession, Parke, B., rejected it, saying, that the onus of proving that the confession was *not* made in consequence of an improper inducement lay on the prosecution; and as it was impossible to collect from the answers of the witness whether such was the case or not, the confession could not be received.⁴ (b)

¹ The 11 & 12 Vict. c. 42, s. 18, gives a form of caution to be given by justices of the peace to persons brought before them charged with offenses. See also 18 & 19 Vict. c. 126, s. 3.

² A large number are collected in Arch. Crim. Plead. 198 *et seq.*, 15th Ed., and Rosc. Crim. Evid. 39 *et seq.*, 6th Ed.

³ Tayl. Ev. § 796, 4th Ed.; 1 Phill. Ev. 408, 10th Ed.; *R. v. Baldry*, 2 Den. C. C. 430; *R. v. Moore*, Id. 522.

⁴ *R. v. Warringham*, 15 Jur. 318; 2 Den. C. C. 430, 447, note.

(a) *Alfred v. State*, 2 Swan. (Tenn.) 581; *State v. Vaigneur*, 5 Rich. (S. C.) 391, where a magistrate before whom a prisoner is brought for examination tells him that if he don't confess he will commit him, a confession then made and sworn to will not be received. *Com. v. Harman*, 4 Penn. St. 269; *People v. McMahon*, 15 N. Y. 384.

(b) *Cain v. State*, 18 Tex. 387; *Simon v. State*, 5 Fla. 285; *Hudson v. Com.*, 2 Duv. (Ky.) 531; *State v. Ostrander*, 18 Iowa, 435; *Whaley v. State*, 11 Ga. 123. In *State v. Peter*, 14 La. Ann. 521, the court said: "Before a confession is permitted to go to the jury the witness to whom it was made should be interrogated as to whether it is voluntary." *State v. Havelin*, 6 La. Ann. 167.

Effect when received — Not conclusive.

§ 552. With respect to the effect of extra-judicial confessions or statements when received, the rule is clear that, unless otherwise directed by statute, no such confession or statement, whether plenary or not plenary, whether made before a justice of the peace, or other tribunal having only an inquisitorial jurisdiction in the matter, or made by deed, or matter in pais, [* 693] * either amounts to an estoppel, or has any conclusive effect against an accused person, or is entitled to any weight beyond that which the jury in their conscience assign to it. (a)

If believed, sufficient without other evidence — Caution.

§ 553. The necessity for clear and unequivocal proof of a corpus delicti,¹ joined to the desire so strongly evinced by our law to protect parties from being unfairly prejudiced by false or hasty statements, gave rise to the doubt whether a conviction can be supported on the mere extra-judicial self-criminative statement of an accused person.² Modern authorities incline to the affirma-

¹ See *suprà*, ch. 2, sect. 3, sub-sect. 2, § 441.

² Math. de Prob. cap. 1, N. 7; *R. v. Eldridge*, R. & R. C. C. 440; *R. v. White*, Id. 508.

(a) *Williams v. Com.*, 29 Penn. St. 102; *People v. Thayers*, 1 Park. Cr. (N. Y.) 595; *State v. Broughton*, 7 Ired. (N. C.) 96; *People v. McMahon*, 2 Park. Cr. (N. Y.) 663; *Hendrickson v. People*, 10 N. Y. 13; *Peter v. State*, 12 Miss. 21; and in all cases such statements or confessions are to go to the jury like any other evidence, and unless corroborated by extrinsic circumstances or other evidence that satisfies the jury, beyond a reasonable doubt, of their truth, a conviction cannot be predicated thereon. But when a prisoner admits his guilt by a plea of guilty, after consultation with his counsel, the plea will be accepted as conclusive. *State v. Welch*, 7 Port. (Ala.) 463; *Smith v. Hunt*, 1 McCord (S. C.), 449; *Donnelly v. State*, 26 N. J. 436; *Barnes v. Allen*, 30 Barb. (N. Y.) 663. Judicial and extra-judicial confessions stand on the same footing as other confessions. *State v. Havelin*, 6 La. Ann. 167.

tive.¹ Still such a principle should be acted on with great caution; for the numerous cases in which persons have wrongly accused themselves, or wrongly acknowledged themselves guilty of crimes, ought to render tribunals very careful of inflicting punishment, when the only proof of crime rests on the statement of the supposed criminal. On capital charges, and charges of murder especially, a double degree of caution is requisite—the truth of the statement should be carefully sifted, and every effort made to obtain evidence to confirm or disprove the *corpus delicti*. These considerations apply with increased force when a confession is not plenary.

*SUB-SECTION III.

[* 694]

INFIRMATIVE HYPOTHESES AFFECTING SELF-CRIMINATIVE EVIDENCE.

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¹ *R. v. Faulkner*, R. & R. C. C. 481; *R. v. Tippet*, Id. 509; *R. v. Wheeling*, 1 Leach, C. L. 311, note. In the United States considerable difference of opinion seems to prevail on this subject. See 1 Greenl. Evid. § 217, 7th Ed.; Wharton, Amer. Crim. Law, 313, 3rd Ed.; Burrill, Circ. Evid. 498.

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Infirmative hypotheses affecting self-criminative evidence.

§ 554. The infirmative hypotheses affecting self-criminative evidence deserve the deepest and most anxious attention. The professors of the civil law, on the revival of its study in Europe, attributed a peculiar virtue to the confessions of parties. It was pronounced a [* 695] *species of proof of so clear, excellent, and transcendent a nature, as to admit of no proof to the contrary.¹ In a great degree connected with this

¹ "Multum à doctoribus rei confessio. Probatio dicitur liquidissima, principalissima, illustrissima, adeò ut non admittat probationem in contrarium." Matthæus de Prob. cap. 1, N. 6. They also called it "probatio probatissima." Bonnier, *Traité des Preuves*, § 241. It would, however, be most unjust to charge this absurdity on the Roman law itself, which in express terms lays down "Si quis ultrò de maleficio fateatur, non semper ei fides habenda sit: nonnunquam enim aut metù, aut quâ aliâ de causâ in se confitentur." Dig. lib. 48, tit. 18, l. 1, § 27, where a strong instance of false confession is recorded. So in another place. "Si quis hominem vivum falso confiteatur occidisse, et postea paratus sit ostendere hominem vivum esse: Julianus scribit, cessare Aquiliam; quamvis confessus sit se occidisse; hoc enim solum remittere actori confessoriam actionem, ne necesse habeat docere, eum occidisse: cæterum occisum esse hominem à quocunque oportet." Dig. lib. 9, tit. 2, l. 23, s. 11. "Hoc apertius est circa vulneratum hominem: nam si confessus sit vulnerasse, nec sit vulneratus, æstimationem cujus vulneris faciemus? vel ad quod tempus

notion was the practice of torturing suspected persons to extract confessions;¹ which, to the disgrace of the civil law in all its modifications,² and likewise of the canon law,³ so long prevailed on the continent. The absurdity, to say nothing of the injustice and cruelty, of that practice has been too ably and too frequently exposed to require notice here⁴—its almost universal *abandonment in our days is perhaps its severest condemnation. The fallacy, also, of attributing a conclu- [* 696] sive effect to confessorial evidence was detected by the intelligence of later times,⁵ and has been abundantly confirmed by experience. Why must a confession of guilt necessarily be true? Because, it is argued, a person can have no object in making a false confessorial

recurremus? Id. l. 24. “Proinde si occisus quidem non sit, mortuus autem sit, magis est, ut non teneatur in mortuo, licet fassus sit.” Id. l. 25. See, also, Dig. lib. 48, tit. 18, l. 1, § 17; tit. 19, l. 27; lib. 11, tit. 1, l. 11, §§ 8 *et seq.*; lib. 42, tit. 2.

¹ Bonnier, *Traité des Preuves*, § 647.

² *Introd.* pt. 2, §§ 69, 70, p. 109, note 1.

³ *Decret. Gratian*, Pars 2, Causa 5, Quæst. 5, cap. 4; *Constit. Clement.* lib. 6, tit. 3, cap. 1, § 1.

⁴ The civilians professed to found all their labors on the Roman law. We have seen in note 1, p. 1014, how grievously they departed from it in one instance, and others might be adduced. On the subject of torture, indeed, they copied their original more faithfully; and yet it would be difficult to find a stronger exposition of the absurdity and danger of the practice, than in the following language of the Digest itself. “Quæstioni fidem non semper, nec tamen nunquam habendam, Constitutionibus declaratur: etenim res est fragilis, et periculosa, et quæ veritatem fallat. Nam plerique patientiâ sive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit: alii tantâ sunt impatientiâ, ut (in) quovis mentiri, quàm pati tormenta velint: ita fit, ut etiam vario modo fateantur, ut non tantùm se, verumetiam alios committuntur.” Dig. lib. 48, tit. 18, l. 1, § 23. Notwithstanding all this, the compilers of the Digest retained the practice of torture in the Roman law, and the cases in which it might be resorted to are carefully pointed out in the same title, and stand side by side with the above passage.

⁵ The later civilians were fully sensible of this fallacy. See *Mascard. de Prob. Quæst.* 7; *Matthæus de Prob.* cap. 1, NN. 4 and 6; 1 *Hagg. Cons. Rep.* 304.

statement, the effect of which will be to interfere with his interest by subjecting him to disgrace and punishment; and consequently the first law of nature — self-preservation — may be trusted as a sufficient guarantee for the truth of any such statement. This reasoning is, however, more plausible than sound. Conceding that every man will act as he deems best for his own interest; still (besides the possibility of his misconceiving facts or law), he may not only be most completely mistaken as to what constitutes his true interest, but it is an obvious corollary from the proposition itself, that, when the human mind is solicited by conflicting interests, the weaker will give place to the stronger; and consequently, that a false confessorial statement may be expected, when the party sees a motive, sufficient in his judgment to outweigh the inconveniences which will accrue to him from making it. Now, while the punishment denounced by law against offenses is visible to all mankind, not only are the motives which induce a person * to avow delinquency confined to his own
[* 697] breast; but those who hear the confessorial statement often know little or nothing of the confessionalist, far less of the innumerable links by which he may be bound to others who do not appear on the judicial stage. The force of these considerations will be better appreciated, when we come to examine separately the principal motives to false confessions;¹ but first, as connected with the whole subject, must be noted a marked distinction between our judicature and that of most foreign nations.

¹ *Infra*.

Continental practice.

§ 555. In the mediæval tribunals of the civil and canon laws, the *inquisitorial* principle was essentially dominant. And this has so far survived, that, in many continental tribunals at the present day, every criminal trial commences with a rigorous interrogation of the accused, by the judge or other presiding officer. Nor is this interrogation usually conducted with fairness toward the accused. Facts are garbled or misrepresented, questions assuming his guilt are not only put, but pressed and repeated in various shapes; and hardly any means are left untried to compel him, either directly or by implication, to avow something to his prejudice. This is no chimerical danger. By artful questioning and working on their feelings, weak-minded individuals can be made to confess or impliedly admit almost any thing; and to resist continued importunities to acknowledge even falsehood, requires a mind of more than average firmness.¹

¹ Look at the trial, if *trial* it can be called, of C. Silanus before the Emperor Tiberius. "Multa aggerabantur etiam insontibus periculosa * * * * non temperante Tiberio quin premeret voce, vultu, eò quòd ipse creberrimè interrogabat; neque refellere aut eludere dabatur; ac sæpe etiam confitendum erat, ne frustrà quæsisisset." Tacitus, Annal. lib. 3, cap. 67. A good instance is to be found in the trial of the Duc de Praslin, in 1847, which having taken place before the Chamber of Peers, at that time the highest tribunal in France, may fairly be supposed to have been conducted with the strictest regularity. The duke was charged with the murder of his wife, and the following is part of his interrogation by the president:

"Was she (the deceased) not stretched upon the floor, where you had struck her for the last time?"

—"Why do you ask me such a question?"

Then follow these questions and answers:

"You must have experienced a most distressing moment, when you saw, upon entering your chamber, that you were covered with the blood which you had just shed, and which you were obliged to wash off?"—"Those marks of blood have been altogether misinterpreted. I did not wish to appear before my children with the blood of their mother upon me."

[* 698] The common law of England *proceeds in a way quite the reverse of all this: holding that the onus of proving the guilt of the accused lies on [* 699] *the accuser, and that no person is bound to criminate himself; according to the maxim, "*Nemo tenetur seipsum prodere.*"¹ It has, therefore, always abstained from physical torture,—"Cruciatus legibus invisus;"²—and taken great care, perhaps too great

"You are very wretched to have committed this crime?"—(The accused makes no answer, but appears absorbed.)

"Have you not received bad advice, which impelled you to this?"—"I have received no advice. People do not give advice on such a subject."

"Are you not devoured with remorse, and would it not be a sort of solace to you, to have told the truth?"—"Strength completely fails me to-day."

"You are constantly talking of your weakness. I have just now asked you to answer me simply 'yes,' or 'no.'"—"If any body would feel my pulse, he might judge of my weakness."

"Yet you have had just now sufficient strength to answer a great many questions in detail. You have not wanted strength for that."—(The accused makes no reply.)

"Your silence answers for you, that you are guilty."—"You have come here with a conviction that I am guilty, and I cannot change it."

"You can change it if you give us any reason to believe the contrary; if you will give any explanation of appearances that are inexplicable upon any other supposition than that of your guilt."—"I do not believe I can change that conviction on your mind."

"Why do you believe that you cannot change that conviction?"—(The accused, after a short silence, said that he had not strength to continue.)

"When you committed this frightful crime, did you think of your children?"—"As to the crime, I have not committed it; as to my children, they are the subject of my constant thoughts."

"Do you venture to affirm that you have not committed this crime?"—(The accused, putting his head between his hands, remained silent for some moments, and then said) "I cannot answer such a question." (11 Jur. 365, Part 2.)

¹ 3 Bulst. 50. See also 14 & 15 Vict. c. 99, s. 3.

² Lofft, M. 434. Whenever torture has been applied in England it was in virtue of some real or imaginary prerogative of the crown, for it could not be awarded in the ordinary course of law. The "*peine, or prisone, forte et dure*" may seem an exception to this, but in truth is not; for the object of it was to compel the accused to *plead*, *i. e.*, say whether he was guilty or not, in order that the court might know whether they ought to proceed to sentence, or impanel a jury to try him.

care, to prevent suspected persons from being terrified, coaxed, cajoled, or entrapped into criminative statements ;¹ and it not only prohibits judicial interrogation in the first instance, but if the evidence against the accused fails in establishing a *prima facie* case against him, will not even call on him for his defense. As, however, the introduction of judicial interrogation into this country has been warmly advocated by able jurists,² we propose to examine briefly the claims of the conflicting systems.

Arguments in favor of judicial interrogation.

§ 556. In favor of judicial interrogation it is argued, first, that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them ; and as the accused must necessarily best know his own guilt or innocence, he is naturally the fittest person to be interrogated on that subject ; and indeed that in many cases, often of the most serious nature, it would be impossible, without his own * testimony, to prove crime against the accused. [* 700] Secondly, that the rule which excuses a man from criminating himself is a protection to none but the evil-disposed ; for not only have innocent persons nothing to dread from interrogation, however severe, but the more closely the interrogation is followed up, the more their innocence will become apparent. And, lastly, that in declining to extract self-disserving statements from the accused himself, while it receives without scruple

¹ See *suprà*, sub-sect. 2, § 551. We speak of the *ordinary* practice of our tribunals ; not of the state trials of former times, where every rule seems to have been reversed.

² Particularly Bentham. See his *Judicial Evidence*, Book 2, chap. 9 ; Book 5, chap. 7 ; Book 9, part 4, chaps. 2, 3, 4 ; and part 5, chap. 3, &c. See also a paper by Mr. Fitzjames Stephen ; *Papers of the Juridical Society*, vol. i. p. 456.

from the mouths of witnesses similar statements which he has made to them, the English law violates its own fundamental rule, which requires the best evidence to be given.

Arguments against it.

§ 557. Before considering what may be directly urged on the other side, it is essential to point attention to an important circumstance commonly lost sight of. In the English system, as in every other, the indictment, information, act of accusation, or whatever else it may be called, is a *general* interrogation of the accused to answer the matters charged; and every material piece of evidence adduced against him is a *question* to him, whereby he is required either to prove that the fact deposed to is false, or explain it consistently with his innocence. Any evidence or explanation he can give is not only receivable, but anxiously looked for by the court and jury; and, in practice, his non-explanation of apparently criminating circumstances always tells most strongly against a prisoner. What our law prohibits is the *special* interrogation of the accused—the converting him, whether willing or not, into a witness against himself; assuming his guilt before proof, and subjecting him to an interrogation conducted on that hypothesis. And here a question naturally presents itself—supposing the interrogation of accused persons advisable, by whom is it to be performed? There seem but two alternatives—the accuser or the court; and, if the extraction of [* 701] **truth* be the *sole* object in view, why is not the accused to be interrogated on oath like other witnesses? But this and the subjecting the accused to the interrogation of the accuser, although sometimes

advocated, is not the continental practice, where the interrogation of the accused is the act of the tribunal. And here a difficulty presents itself at the outset — how is an abuse of power in this respect to be rectified? Improper questions put to a witness by a party or his counsel may be objected to by the other side, and the judge determines whether the objection is well founded. But when the judge is the delinquent, who is to call him to order? Decency and the rules of practice alike prohibit counsel from taking exception to questions put by the bench; and, indeed, the doing so would be appealing to a man against himself.

§ 558. But to test this important question by broader principles. First, then, the functions of tribunals appointed to determine causes are primarily and essentially *judicial*, not *inquisitorial*. The tribunal is to judge and decide; to supply the proofs — the materials for decision — belongs in general to the litigant parties, though the inquisitorial principle is recognized thus far, that the tribunal is empowered to extract facts from the instruments of evidence adduced, and in some cases to compel the production of others which have been withheld. In the next place, the proposition that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them, must be understood with these limitations: first, that those means be such as are likely to extract the truth in the majority of cases; and, secondly, that they be not such as would give birth to collateral evils, outweighing the benefit of any truth they might extract.¹ Admitting, [* 702]
*therefore, that the *special* interrogation of ac-

¹ See Introd. pt. 2.

cused persons might in some cases extract truth which otherwise would remain undiscovered (indeed the same may be said of torture, duress of imprisonment, or any other violent means adopted to compel confession), the law is fully justified in rejecting the use of such an engine, if on the whole prejudicial to the administration of justice. Now that sort of interrogation, even when conducted with the most honest intention, must, in order to be effective, assume the shape of cross-examination, and consequently involve the judge in an intellectual contest with the accused,—a contest unseemly in itself, dangerous to the impartiality of the judge, and calculated to detract from the moral weight of the condemnation of the accused, though ever so guilty. In gladiatorial conflicts of this kind, the practiced criminal has a much better chance of victory than an innocent person, embarrassed by the novelty and peril of his situation; whose honesty would probably prevent his attempting a suppression of truth, however much to his prejudice; and whose inexperience in the ways of crime, were he in a moment of terror to resort to it, would insure his detection and ruin. But where the judge is dishonest or prejudiced, the danger increases immeasurably. The screw afforded by judicial interrogation would then supply a ready mode of compelling obnoxious persons, under penalty of condemnation for silence, to disclose their most private affairs; and corrupt governments would be induced, in order to get at the secrets of political enemies, or sweep them away by penal condemnation, to place unprincipled men on the bench, thus polluting justice at its source. In short, judicial interrogation, however plausible in theory, would be found in practice a *moral torture*; scarcely less dangerous than the physical torture

of former times, and, like it, unworthy of a place in the jurisprudence of an enlightened country.

False self-criminative statements — Motives for, sometimes impossible to ascertain.

* § 559. To return to the subject of false self-criminative statements. It is sometimes impos- [* 703] sible to ascertain the motive which has led to a confession indisputably false. In November, 1580, a man was convicted and executed on his own confession, for the murder, near Paris, of a widow who was missing at the time, but who, two years afterward, returned to her home.¹ And the celebrated case of Joan Parry and her two sons, executed in this country in the seventeenth century, for the murder of a man named Harrison, who re-appeared some years afterward, affords another instance. That conviction proceeded chiefly on the confession of one of the accused; whether the result of insanity, fear, improper inducements to confess, or the desire of revenge against his fellow prisoners, it is difficult to determine.²

Two classes of — Resulting from mistake.

§ 560. All false self-criminative statements are divisible into two classes—those which are the result of MISTAKE on the part of the confessionalist, and those which are made by him in expectation of BENEFIT. And the former are two-fold—mistakes of *fact* and mistakes of *law*.

¹ Bonnier, *Traité des Preuves*, § 256. This seems the case referred to in Matthæus de Probat. cap. 1, N. 4.

² 14 Ho. St. Tr. 1312. See also the false confession by John Sharpe of the murder of Catharine Elmes, Ann. Reg. for 1833, Chron. 74.

Of fact.

§ 561. First, of mistakes of *fact*. A man may believe himself guilty of a crime, either when none has been committed, or where a crime has been committed, but by another person. Mental aberration is the obvious origin of many such confessions. But the actors in a tragedy may be deceived by surrounding circumstances, as well as the spectators. A case has been cited in a former [* 704] part of this work,¹ where a girl * died in convulsions while her father was in the act of chastising her very severely for theft, and he fully believed that she died of the beating; but it afterward turned out she had taken poison on finding her crime detected. If the surgeon had not made a post-mortem examination, that man would have been indicted for homicide, and most probably would have pleaded guilty to manslaughter, at least. Instances frequently occur where death from previously existing disease follows shortly after the unjustifiable infliction of wounds or blows, believed by the guilty party to have been fatal.² So, a man may mistake for a robber a corpse which has been secretly conveyed into his chamber, inflict blows or wounds on it, and, discovering the mistake, consider himself guilty of homicide.³ A habitual thief may, by confounding one of his exploits with another, suppose and admit himself guilty of an offense in which he really bore no part;⁴ although it must be acknowledged that justice is not likely to suffer much from this. Under the

¹ *Suprà*, ch. 2, § 447; Beck's Med. Jur. 766.

² See Taylor's Med. Jur. chap. 29, 7th Ed.

³ See the story of the Little Hunchback in the Arabian Nights' Entertainments.

⁴ 3 Benth. Jud. Ev. 157, 158.

present head may be classed some of the confessions of witchcraft that will be noticed presently.¹

Of law.

§ 562. 2. Next, as to mistakes of *law*. It should never be forgotten that all confessions avowing delinquency in general terms are, more or less, *confessiones juris*; and this will in a great degree explain, what to unreflecting minds seems so anomalous, the caution exercised by British judges in receiving a plea of guilty.² The same observation, of course, applies to all extra-judicial statements which are not mere relations of facts. And here one great cause of error is ignorance of the meaning of forensic terms;³ especially *where the accused, conscious of *moral*, [* 705] is unaware that he has not incurred *legal* guilt. Thus, a man really guilty of fraud or larceny might plead guilty to a charge of robbery, through ignorance that, in legal signification, the latter means a taking of property accompanied with violence to the person, though it is popularly used to designate any act of barefaced dishonesty. This is a mistake which formerly might have cost a man his life; and to this hour a person really guilty of manslaughter might, through ignorance, plead guilty of the capital offense of murder. Again, the distinction between larceny and aggravated trespass is sometimes very slight; so that an ignorant man, con-

¹ *Infra*.

² *Supra*, sub-sect. 1, § 548.

³ 27 Ass. pl. 40. A woman was arraigned for having feloniously stolen some bread, who said that she did it by command of her husband,—and the justices through pity would not take her acknowledgment, but took the inquest, by which it was found that she did it by coercion of her husband against her will, whereupon she went quit, &c

scious that he cannot defend his right to property which he has taken, might plead guilty to a charge of larceny, where there had been no *animus furandi*.

In expectation of benefit — To escape vexation.

§ 563. In the other class of false self-criminative statements, the statement is known by the confessionalist to be false, and is made in expectation of some *real or supposed benefit*. It is obviously impossible to enumerate the motives which may sway the minds of men to make false statements of this kind.¹ First, many are made for ease, and to avoid vexation arising out of the charge; and in some of these cases the cause of the false statement is apparent, viz., when it is made to escape torture, either physical or moral.² In others it is less obvious. Weak or timorous persons, confounded at finding themselves in the power of the law, or alarmed at the testimony of false witnesses, or the circumstantial evidence against them, or distrustful *of the honesty or capacity of their
[* 706] judges, hope, by an avowal of guilt, to obtain leniency at their hands.³

¹ See Benth. Jud. Ev. Book 5, chap. 6, sects. 2 and 3.

² See *supra*, §§ 554 *et seq.*

³ A striking instance of this is afforded by the case of the two Boorns, who were convicted in the Supreme Court of Vermont, in Bennington county, in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a severe blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he was murdered, which were increased by the finding of his hat in the same field a few months afterward. These suspicions, in process of time, subsided; but, in 1819, one

§ 564. Moreover, an innocent man, accused or suspected of a crime, may deem himself exposed to annoyance at the hands of some person, to whom his *suffering as for that crime would be acceptable.¹ [* 707.] To this class belong those cases where the evidence necessary to establish the innocence of the confessionalist would bring before the world, in the character of a criminal, some eminent individual, whose reward for a false acknowledgment of guilt would be great, and whose vengeance for exposure might be terrible; or would be the means of disclosing transactions which it was the interest of many to conceal. Under circumstances like these, the accused is induced by threats or bribes to suppress the defense, and own himself the author of the crime imputed to him.

of the neighbors having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field, and in a hollow stump, not many rods from it, were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised, by some misjudging friends, that, as they would certainly be convicted upon the circumstances proved, their only chance for life was by commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. 1 Greenl. Ev. § 214, note 2, 7th Ed.

¹ 3 Benth. Jud. Ev. 124.

2. *From collateral objects*—1. *Relating to the party himself*—1. *To stifle inquiry into other matters.*

§ 565. But false self-criminative statements also arise from objects wholly collateral, relating either to the party himself, or to others. 1. With respect to the first of these: 1. A false confession of an offense may be made with the view of stifling inquiry into other matters, as for instance, some more serious offense of which the confessionalist is as yet unsuspected.¹

2. *Tædium vitæ.*

§ 566. 2. The most fantastic shape of this anomaly springs from the state of mental unsoundness which is known by the name of *tædium vitæ*.² Several instances are to be found, where persons tired of life have falsely accused themselves as the perpetrators of *capital* crimes, either purely fictitious, or, if real, committed by others.³ In such cases the maxim of the continental [* 708] *lawyers, “*nemo auditur perire volens*,” may be applied with advantage.

Relation between the sexes.

§ 567. 3. “In the relation between the sexes,” says Bentham, when treating of the subject of false confessions,⁴

¹ *Id.*

² See Bacon’s *Essay on Death*; Dig. lib. 29, tit. 5, l. 1, § 23; Matth. de Crimin. ad lib. 48 Dig. tit. 16, cap. 1, N. 2.

³ A Frenchman named Hubert was convicted, and executed, on a most circumstantial confession of his having occasioned the great fire of London in 1666; “although,” adds the historian, “neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch weary of life, and chose to part with it in that way.” *Continuation of Lord Clarendon’s Life*, 352, 353.

⁴ Bonnier, *Traité des Preuves*, §§ 256 and 257; D’Aguesseau (*Œuvres*), tom. 4, p. 186; 5 *Causes Célèbres*, 454, Ed. Richer; Matth. in loc. cit.

⁵ § Benth. Jud. Ev. 116, 117.

“may be found the source of the most natural exemplifications of this as of so many other eccentric flights. The female unmarried—punishment as for seduction hazarded, the imputation invited and submitted to, for the purpose of keeping off rivals, and reconciling parents to the alliance. The female married—the like imputation, even though unmerited, invited, with a view to marriage, through divorce.” So sensible was the canon law of this country of the danger of false confessions from this source, that it would not allow adultery to be proved (at least for the purpose of divorce à vinculo matrimonii) by the unsupported confession, judicial or extra-judicial, of the guilty party.¹ But it has been held by the Court for Divorce and Matrimonial Causes, established by 20 & 21 Vict. c. 85, that under that statute, a decree for dissolution of marriage may be granted if there be evidence, not open to exception, of admissions of her adultery by the wife, and without any other proof.²

Vanity.

§ 568. 4. “Vanity,” observes the jurist above quoted,³ “without the aid of any other motive, has been known (the force of the moral sanction being in * these cases divided against itself) to afford an interest, strong enough to engage a man to sink [* 709] himself in the good opinion of one part of mankind, under the notion of raising himself in that of another. False confessions, from the same motive, are equally

¹ See the Canons of 1597, cap. 6, and of 1604, cap. 105. Also, the judgment of Sir William Scott in *Mortimer v. Mortimer*, 2 Hag. Cons. Rep. 316; Gibs. Cod. Jur. Eccl. Angl. tit. 22, cap. 17, and Ought. Ordo Jud. tit. 213.

² *Williams v. Williams*, L. Rep., 1 P. & D. 29. And see, per Cockburn, L. C. J., *Robinson v. Robinson*, 1 Swab. & T. 393; 5 Jur., N. S. 392.

³ 3 Benth. Jud. Ev. 117–18.

within the range of possibility, in regard to all acts regarded in opposite points of view by persons of different descriptions. I insulted such or such a man: I wrote such or such a party pamphlet, regarded by the ruling party as a libel, by mine as a meritorious exertion in the cause of truth: I wrote such or such a religious tract, defending opinions regarded as heretical by the Established Church, regarded as orthodox by my sect." "Quam multi," says one of the ablest of the later civilians,¹ "sunt gloriosi militis similes, qui triginta Sardos, sexaginta Macedones, centum Cilices uno die occidissee se gloriantur, atque etiam elephanto in Indiâ pugno perfregisse femur; quos poenâ potiùs quam commiseratione dignos dixerit nemo." False statements of this kind are sometimes the offspring of a morbid love of notoriety at any price. The motive that induced the adventurous youth to burn the temple of Ephesus would surely have been strong enough to induce him to declare himself, however innocent, the author of the mischief, had it occurred accidentally.

Other instances.

§ 569. 5. Several other instances may be found, of false confessions made with a view to some specific collateral end.² The Amalekite who falsely accused himself of having slain Saul, presents an early and authentic instance.³ Soldiers engaged on foreign service not unfrequently declare themselves guilty of having
[* 710] * committed crimes at home, in order that by being sent back to take their trial they may

¹ Matth. de Crimin. ad lib. 48 Dig. tit. 16, cap. 1, N. 3.

² Under this head comes the celebrated case of the slave Primitivus, who, to escape from his master, falsely accused himself and others of homicide. Dig. lib. 48, tit. 18, l. 1, § 27.

³ 2 Sam. 1.

escape from military duty.¹ Formerly when transportation was looked upon by many of the lower orders in the light of a boon rather than a punishment, offenses were occasionally committed to provoke it; and it is not improbable that false confessions of offenses committed by others were made with the same object.

When other parties are involved—Desire of benefiting others.

§ 570. 2. Hitherto we have been considering cases where the false confession is made with the view of benefiting the confessionalist himself. We now proceed to those in which other parties are involved. 1. The strongest illustrations of this are where the person who makes the false confession is desirous of *benefiting* others; as, for instance, to save the life, fortune or reputation of, or to avert suffering from a party whose interests are dearer to him than his own.² The less exalted motive of money has sometimes had the same effect.³

¹ False confessions of *desertion* are so common that a special clause respecting them is inserted in the annual mutiny acts. See the last of these, 32 & 33 Vict. c. 4, s. 37.

² A singular instance of this is said to have taken place at Nuremberg, in 1787, where two women in great distress, in order to obtain for the children of one of them the provisions secured to orphans by the law of that country, falsely charged themselves with a capital crime. They were convicted; and one was executed, but the other died on the scaffold through excitement and grief at witnessing the death of her friend. Case of *Maria Schoning* and *Anna Harlin*, *Causes Célèbres Etrangères*, vol. 1, p. 200, Paris, 1827. A case is also mentioned where, after a serious robbery had been committed, a man drew suspicion of it on himself, and when examined before a magistrate dropped hints amounting to a constructive admission of his guilt; in order that his brothers, who were the real criminals, might have time to escape; and afterward on his trial, the previous object having been attained, proved himself innocent by a complete alibi. 1 Chit. Crim. Law, 85. It is well known that persons have sometimes destroyed themselves with the view of benefiting their families.

³ “On assure qu'en Chine il y a des personnes qui avouent pour autrui des délits légers, afin de subir la punition au lieu et place du véritable coupable,

Desire of injuring others.

[* 711] *§ 571. 2. The desire of *injuring* others has occasionally led to the like consequence. Persons reckless of their own fate have sought to work the ruin of their enemies, by making false confessions of crimes and describing them as participators. We shall feel little surprise at this, when we recollect how often persons have inflicted grievous wounds on themselves, and even in some instances it is said committed suicide, in order to bring down suspicion of intended or actual murder on detested individuals.¹

qui les indemnise ensuite largement." Bonnier, *Traité des Preuves*, § 256: no authority cited. A modern traveler, also, speaking of China, says: "Persons condemned to death may procure a substitute, who can be found on payment of a sum of money." Berncastle's *Voyage to China*, vol. 2, p. 167. See Norton, *Evid.* 115; Goodeve, *Evid.* 573, ad id. We give these extraordinary statements as we find them.

After the publication of the third edition, the author received a letter on this subject from Mr. T. T. Meadows, British Consul at Newchwang, Northern China, in which he says, "I feel desirous of removing a doubt expressed at the end of your note (2), p. 690 (3rd edition), respecting Chinese substitutes in criminal cases. In 1847, I published a volume of 'Desultory Notes on the Government and People of China;' and the 13th note is headed 'On personating criminals.' * * * I think that note will satisfy you that the personation of criminals, and that in cases involving capital punishment, is a well-known fact. I have, since writing that note in 1846, spent fifteen years in active service in this country, four of them as consul at Ningpo and Shanghai in Middle China, and now four as consul at this port, the most northerly of the empire; and I can assure you that the custom exists everywhere throughout it. The thing is naturally not one very frequently done. But the term 'ting heung

頂兇

lit. personate murderer, is probably as familiar to those convers-

ant with Chinese criminal proceedings and laws, as is, for instance, the English term 'turn Queen's evidence' to those conversant with English criminal proceedings. The inducement is not always money. Juniors in families have been known to personate their criminal seniors, and even domestic slaves or serfs their guilty masters to whom they were attached."

¹ See bk. 2, pt. 2, § 206.

Confessions of impossible offenses.

§ 572. The anomaly of false confession is not confined to cases where there might have been a criminal or *corpus delicti. Instances are to be found in [* 712] the judicial histories of most countries where persons, with the certainty of incurring capital punishment, have acknowledged crimes now generally recognized as impossible. We allude chiefly to the prosecutions for witchcraft and visible communion with evil spirits, which in former ages, and especially in the seventeenth century, disgraced the tribunals of these realms. Some of them present the extraordinary spectacle of individuals, not only freely (so far as the absence of physical torture constitutes freedom) confessing themselves guilty of these imaginary offenses, with the minutest details of time and place; but even charging themselves with having, through the demoniacal aid thus avowed, committed repeated murders and other heinous crimes.¹ The cases in Scotland are even more monstrous than those in England,² but there is strong reason to

¹ See the cases of *Mary Smith*, 2 Ho. St. Tr. 1049; and of the *Three Devon Witches*, 8 Ho. St. Tr. 1017; the note to the case of the *Bury St. Edmond's Witches*, 6 Ho. St. Tr. 647; and the case of the *Essex Witches*, 4 Ho. St. Tr. 817, the latter especially. The confessions of Anne Cate, 4 Ho. St. Tr. 856, of Rebecca West, Id. 840, of Rose Hallybread, Id. 852, of Joyce Boanes, Id. 853, and of Rebecca Jones, Id. 854, are among the most remarkable; the two first of which are set out in the Appendix to this work, No. II.

² A large number of these are collected in Arnot's Collection of celebrated Criminal Trials in Scotland, pp. 347 *et seq.*, Edinb. 1785; and in Pitcairn's "Criminal Trials in Scotland," Edinb. 1833, tit. "Witchcraft," in the General Index. See, in particular, the case of Isabel Elliot, Sept. 13, 1678, who, with nine others, judicially confessed to have been baptized by the devil, and to have had carnal copulation with him. They were all convicted and burnt. (Arnot, 360, 361.) A similar confession was made by Issobell Gowdie, 13 April, 1662; Pitcairn, vol. 4, p. 602. See, also, the case of *Bessie Dunlop*, Id. vol. 2, p. 49.

believe that in most of them the confession was obtained by torture;¹ and the following sensible solution of the psychological phenomenon which they all [^{* 713}] * present, is given by an eminent writer on the criminal law of the former country:² — “All these circumstances duly considered; the present misery; the long confinement; the small hope of acquittal; the risk of a new charge and prosecution; and the certain loss of all comfort and condition in society — there is not so much reason to wonder at the numerous convictions of witchcraft on the confessions of party. Add to these motives, though of themselves sufficient, the influence of another, as powerful perhaps as any of them, — the unsound and crazy state of imagination in many of those unhappy victims themselves. In those times, when every person, even the most intelligent, was thoroughly persuaded of the truth of witchcraft, and of the possibility of acquiring supernatural powers, it is nowise unlikely that individuals would sometimes be found, who, either seeking to indulge malice, or stimulated by curiosity and an irregular imagination, did actually court and solicit a communication with evil spirits, by the means which, in those days, were reputed to be effectual for such purpose. And it is possible that among these there might be some who, in the course of a long and constant employment in such a wild pursuit, came at last to be far enough disordered, to mistake their own dreams and ravings, or hysteric affections, for the actual interviews and impressions of Satan.” The following case is reported as having occurred in India in 1830. Three prisoners were made to

¹ For a full description of the instruments of torture used for this purpose, see Pitcairn, vol. 2, pp. 50, 375, 376.

² Hume's Crim. Law of Scotland, vol. 1, p. 591.

confess before the police to having, by means of sorcery, held forcible connection with the wife of the prosecutor, then in the tenth month of her pregnancy, beat or otherwise ill-treated her, and afterward taken the child out of her womb, and introduced into it, in lieu thereof, the skin of a calf and an earthen pot, in consequence of which she died. These confessions were corroborated by the discovery in the *womb of the deceased, of an earthen pot and a piece of calf's skin: but the [* 714] prisoners were acquitted, principally on the ground that the earthen pot was of a size that rendered it impossible to credit its introduction during life.¹

Additional infirmative hypotheses in extra-judicial confessorial statements — Mendacity — Misinterpretation — Incompleteness.

§ 573. The above causes affect, more or less, every species of confessorial evidence. But *extra-judicial* confessorial statements, especially when not plenary, are subject to additional infirmative hypotheses, which are sometimes overlooked in practice. These are *mendacity* in the report; *misinterpretation* of the language used; and *incompleteness* of the statement.² 1. "Mendacity." The supposed confessorial statement may be, either wholly or in part, a fabrication of the deposing witnesses. And here it should not be forgotten, that of all sorts of evidence, that which we are now considering is the most easy to fabricate, and, however false, the most difficult to confront and expose by any sort of counter-evidence, direct or circumstantial.³ 2. "Misinterpre-

¹ *Kutti v. Chatapan and others*: Arbuthnot, Reports of the Foujdaree Udalt of Madras, 20.

² 3 Benth. Jud. Ev. 113.

³ Foster's Cr. Law, 243; 4 Blackst. Comm. 357; 1 Greenl. Evid. § 214, 7th Ed.

tation." No act or word of man, however innocent or even laudable, is exempt from this. *E. g.*, a paper in the handwriting of the accused is found in his possession, in which he is spoken of as guilty of the offense imputed to him. This is consistent with his guilt; but, on the other hand, that paper may be a libel on him, which the accused has kept with a view of refuting the libel, or of bringing the libeller to justice.¹ Again, entirely fallacious conclusions may be drawn from language uttered in a jest, or by way of bravado;² as [* 715] * where a man wrote to his friend, who was summoned as a juror on a trial which excited much public attention, conjuring him to convict the defendant, guilty or innocent.³ But equally unfounded inferences are sometimes drawn from words, supposed to be confessorial, having been used with reference to an act not identical with the subject of accusation or suspicion; as where a man who has robbed or beaten another, hearing that he has since died, utters an exclamation of regret for having ill-treated him. In the case of a female accused of adultery, part of the proof was a self-disserv-

¹ 3 Benth. Jud. Ev. 114.

² The unfortunate result of the case of Richard Coleman at the Kingston Spring Assizes of 1749, was partly, if not chiefly, owing to this cause. A woman had been brutally assaulted by three men, and died from the injuries she received. It appeared that at the time of the commission of the outrage, one of the offenders called another of them by the name of Coleman, from which circumstance suspicion attached to the prisoner. Coleman, who was in a public-house intoxicated, was asked by a person there, with the view of ensnaring him, if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes I was, and what then?" or according to another account, "If I was, what then?" On this and some other circumstances he was convicted and executed, but the real criminals were afterward discovered. Two of them were executed, confessing their guilt, the third having been admitted to give evidence for the Crown. Willa, Circ. Evid. 67 & 71, 3rd Ed.

³ 3 Benth. Jud. Ev. 115.

ing statement in these words, "I am very unhappy—for God's sake hide my faults—those who know not what I suffered will blame my conduct very much." "Am I," said Lord Stowell, commenting on this, "placed in such a situation, by this evidence, as to say that it must necessarily refer to adultery? She has been detected in imprudent visits—it might allude to them."¹ But of all causes of misinterpretation of the language of suspected persons, the greatest are the haste and eagerness of witnesses, and the love of the marvelous so natural to the human mind, by which they are frequently prompted to mistake expressions as well as to imagine or exaggerate facts, especially where the crime is either very atrocious or peculiar.² 3. The remaining cause of error in confessorial *evidence of this nature is "Incompleteness;" *i. e.*, where words, though not misunderstood [* 716] in themselves, convey a false impression for want of some explanation, which the speaker either neglected to give, or was prevented by interruption from giving, or which has been lost to justice in consequence of the deafness or inattention of the hearers. "Ill hearing makes ill rehearsing," said our ancestors. Expressions may have been forgotten, or unheeded, in consequence of witnesses not being aware of their importance; *e. g.*, a man suspected

¹ *Williams v. Williams*, 1 Hagg. Cons. Rep. 304.

² See *suprà*, ch. 1, § 296; and note to *Earle v. Picken*, 5 C. & P. 542. A remarkable instance of this is presented in the case of *R. v. Simons*, 6 C. & P. 540. The prisoner was indicted for the then *capital* offense of having set fire to a barn; and a witness was called to prove that, as the prisoner was leaving the magistrate's room after his committal, he was overheard to say to his wife, "Keep yourself to yourself, and don't marry again." To confirm this another witness was called, who had also overheard the words, and stated them to be, "Keep yourself to yourself, and keep your own counsel;" on which Alderson, B., remarked, "One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such evidence." The prisoner was acquitted.

of larceny acknowledges that he took the goods against the will of the owner, adding that he did so because he thought they were his own. Many a bystander, ignorant that this latter circumstance constitutes a legal defense, would remember only the first part of the statement.

Non-responsion.

§ 574. Before dismissing the subject of self-dis-serving evidence in criminal cases, it remains to advert to the force and effect of "Non-responsion," or silence under accusation; "Evasive responsion," and "False responsion." First then with respect to "Non-responsion." When a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he makes neither reply nor remark, the inference naturally arises that the imputation is well founded, or he would have repelled it. We have already alluded to the fallacy of the assumption, *that silence is in all respects tantamount [* 717] to confession;¹ and, however strongly such a circumstance may tell against suspected persons in general, there are many considerations against investing it with conclusive force. 1. The party, owing to deafness or other cause, may not have heard the question or observation; or, even if he has, may not have understood it as conveying an imputation upon him. 2. Supposing the accused to have heard the question or observation, and understood it as conveying an imputation upon him, his *momentary* silence may be caused by impediment of utterance, or a feeling of surprise at the imputation.² 3. When this kind of evidence is in an extra-judicial form, the transaction comes to the tribunal through the

¹ *Supra*, sec. 1, § 521.

² Burrill, Circ. Evid. 575 & 483.

testimony of witnesses, who may either have misunderstood, or who willfully misreport it. 4. Assuming the matter correctly reported, the following observations of Bentham are certainly very pertinent and forcible. "The strength of it" (*i. e.*, the inference of guilt from evidence like that we are now considering) "depends principally upon two circumstances: the strength of the appearances (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated),—the strength of the appearances, and the quality of the interrogator. Suppose him a person of ripe years, armed by the law with the authority of justice, authorized (as in offenses of a certain magnitude, persons in general commonly are under every system of law) to take immediate measures for rendering the supposed delinquent forthcoming for the purposes of justice,—authorized to take such measures, and to appearance having it in contemplation so to do;—in such case, silence instead of answer to a question put to the party by such a person, may afford an inference little (if at all) weaker than that *which would be afforded by the like deportment in case [* 718] of judicial interrogation before a magistrate. Suppose (on the other hand), a question put in relation to the subject, at a time distant from that in which the cause of suspicion has first manifested itself,—put at a time when no fresh incident leads to it,—put, therefore, without reflection, or in sport, by a child, from whom no such interposition can be apprehended, and to whose opinion no attention can be looked upon as due: in a case like this, the strength of the inference may vanish altogether."¹

¹ 8 Benth. Jud. Ev. 92.

Evasive responcion.

§ 575. Connected with the subject of non-responcion is that of incomplete or "Evasive responcion:" *i. e.*, where a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he either evades the question; or, while denying his guilt, refuses to show his innocence, or to answer or explain any circumstances which are brought forward against him as criminative or suspicious. The inference of guilt from such conduct is weakened by the following additional considerations: 1. A man ever so innocent cannot always explain all the circumstances which press against him. Thus, on a charge of murder, the accused declared himself unable to explain how his night-dress became stained with blood; the truth being that, unknown to him, his bed-fellow had had a bleeding wound.¹ So, a man charged with larceny could not explain how the stolen property found its way into his house or trunk, if, unknown to him, it had been deposited there by others.² 2. In many cases an accused or suspected person can only explain particular circumstances, by criminating other individuals whom he is unwilling to [* 719] *expose, or disclosing matters which, though unconnected with the charge, he is anxious to conceal. Sometimes, too, though blameless in the actual instance, he could only prove himself so by showing that he was guilty of some other offense. 3. Where a prosecution is altogether groundless — the result of conspiracy,

¹ See a case of this kind in Chambers' Edinburgh Journal, for March 11, 1837.

² See bk. 2, pt. 2, § 206.

or likely to be supported by perjured testimony, it is often good policy, on the part of its intended victim, not to disclose his defense until judicially demanded of him on his trial.

False responsion.

§ 576. "False responsion," however, is a criminative fact very much stronger than either of the former. Bentham justly observes that, in justification of simple silence, the defense founded on incompetency on the part of the interrogator may be pertinent, and even convincing; but that to false responsion the application of it could scarcely extend. To the claim which the question had to notice, the accused or suspected person has himself borne sufficient testimony; so far from grudging the trouble of a true answer, he bestowed upon it the greater trouble of a lie.¹ The infirmative hypotheses here seem to be, 1. The possibility of extra-judicial conversations having been misunderstood or misreported; 2. As innocent persons, under the influence of fear, occasionally resort to false evidence in their defense, false statements may arise from the same cause. The maxim "*Omnia præsumuntur contra spoliatores*," to which that subject belongs, has been examined in a former chapter.²

Legitimate use of cases of false self-criminative statements.

§ 577. While the vulgar notion, derived probably from mediæval times, when it was sanctioned by the then all-powerful authority of the civilians and canonists,³ that confessions of guilt are necessarily true, is at variance *with common sense, experience, law and practice; still, it must never be forgotten that such [* 720]

¹ 3 Benth. Jud. Ev. 94.

² See *suprà*, § 554.

³ *Suprà*, ch. 2, sect. 2, sub-sect. 8.

confessions constitute in general proof of a very satisfactory, and, when in a judicial or plenary shape, of the most satisfactory character. Reason and the universal voice of mankind alike attest this; and the legitimate use of the unhappy cases, above recorded, and others of a similar stamp, is to put tribunals on their guard against attaching undue weight to this sort of evidence. The employing them as bugbears to terrify, or the converting them into excuses for indiscriminate skepticism or incredulity, is a perversion, if not a prostitution, of the human understanding.

* CHAPTER VIII.

[* 721]

EVIDENCE REJECTED ON GROUNDS OF PUBLIC POLICY.

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Evidence rejected on grounds of public policy — Matters thus excluded — Political.

§ 578. Under this head might in strictness be classed all evidence rejected by virtue of any exclusionary rule,

seeing that it is to public policy all such rules owe their existence. But the expression, "evidence rejected on grounds of public policy," is here used in a limited sense; as signifying that principle by which evidence, receivable so far as relevancy to the matters in dispute is considered, is rejected on the ground that from its reception some collateral evil would ensue to third parties or to society. One species of this has been already treated of under the head of witnesses who, as has been shown, are privileged from answering questions having a tendency to criminate, or to expose them to penalty or forfeiture, and in some cases even merely to degrade them.¹ But taking a general view of the subject, *the matters thus excluded on grounds of public policy may be divided into *political*, *judicial*, [* 722] *professional*, and *social*. Under the first come all secrets of state; such as state papers, communications between government and its officers, and the like. A strong application is to be found in the rule, that the channels through which information reaches the ears of government must not be disclosed.² When, on trials for forging or uttering forged bank notes, the officers of the bank explain to the tribunal the private marks on its true notes by which forgery is detected, the discrepancy between them and the forged notes is generally found corrected in the next issue of forged paper.

Judicial—Grand jurors.

§ 579. *Judicial.* The principal instance of this is in the case of jurymen. First, *grand* jurors cannot,

¹ Bk. 2, pt. 1, ch. 1.

² See the *Attorney-General v. Bryant*, 15 M. & W. 169, and the cases there referred to.

at least in general, be questioned as to what took place among, or before them, while acting as such.¹ (a) In an early case on this subject² we are informed that "the judge would not suffer a grand jurymen to be produced as a witness, to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions." "See," adds the reporter, "if a witness is questioned for a false oath to the grand jury, how it shall be proved if some of the jury be not sworn in such a case." He refers to a case of *Hitch v. Mallet*, where the point was raised, and adds a quære what became of it. Considering that the grand jury are the inquest of the county, whose duty is not merely to examine the bills of indictment sent before them, but to inquire into its state, and present to the Queen's justices any thing they may find amiss in it, there appears reason for throwing the protection of secrecy over their deliberations. But perjury, or indeed any other offense, [* 723] *committed in their presence, and afterward made the subject of an indictment, or information, is a very different matter. Suppose a witness were to murder or assault another witness in the presence of the grand jury, would not the evidence of its members be receivable against him? Or suppose, on a dispute arising out of the business before them, one of the grand jury were to murder or assault another, is he to go unpunished? The grand juror's oath is to keep secret

¹ Tayl. Ev. § 863, 4th Ed.

² Clayt. 84, pl. 140.

(a) *Com. v. Hill*, 11 Cush. (Mass.) 140; *Huidenkoper v. Cotton*, 3 Watts (Ky.), 56; *McLellan v. Richardson*, 1 Shep. (Me.) 82; *Low's Case*, 4 Greenl. (Me.) 489; 12 Viner's Abr., 38 title Evidence.

"the Queen's counsel, his fellows', and his own;"¹ it is obvious that the cases just put do not come under either of the latter heads; and, by instituting the prosecution, the crown has waived the privilege of secrecy so far as its rights are concerned.²

Petty jurors.

§ 580. Secondly, the evidence of *petty* jurors is not receivable to prove their own misbehavior, or that a verdict which they have delivered was given through mistake.³ In order to guard against misconceptions as to the findings of juries, it is the established practice of the courts not to receive a verdict unless all the jurors by whom it is given are present and within hearing; and, after it is recorded, the officer rehearses it to them as recorded and asks them if that is the verdict of them all. The allowing a jurymen to prove the real or pretended misbehavior or mistake of himself or his companions would open a wide door to fraud and malpractice in cases where it is sought to impeach verdicts. (*a*)

¹ 8 Ho. St. Tr. 759, 772, note. It was formerly considered treason or felony in a grand juror to disclose the king's counsel, 27 Ass. pl. 63; Bro. Abr. Corone, pl. 113.

² See 4 Christ. Blackst. Com. 126, note 4, 303, note 1, and Tayl. Ev. § 863, 4th Ed.

³ *Goodman v. Cotherington*, 1 Sid. 235; *Norman v. Beamont*, Willes, 487, note; *Palmer v. Crowle*, Andr. 382; *Vaise v. Delaval*, 1 T. R. 11; *Straker v. Graham*, 4 M. & W. 721. The competency of jurymen as witnesses in a cause which they are trying is a wholly different question; for which see bk. 2, pt. 1, ch. 2, § 187.

(*a*) The rule is inflexible that jurors cannot, under any circumstances, be allowed to impeach their verdict, either by showing that a mistake was made by them in computation or otherwise, or to establish *misconduct* on the part of any member of the panel; *Meade v. Smith*, 16 Conn. 346; *Jackson v. Williamson*, 2 T. R. 281; *Vaise v. Delaval*, 1 id. 11; *Withers v. Fiscus*, 40 Ind. 131; 13 Am. Rep. 283; for instance, erroneous computation; *Withers v. Fiscus*, *ante*;

Professional—Communications to legal advisers.

[* 724] *§ 581. *Professional.* 1. At the head of these stand communications made by a party to his legal advisers, *i. e.*, counsel, attorney, etc.;¹ and this includes all media of communication between them; such as clerks,² interpreters,³ or agents.⁴ But the privilege does not extend to matters of fact, which the attorney knows by any other means than confidential communication with his client, though if he had not been employed as attorney he probably would not have known them.⁵ And the privilege is not the privilege of the professional man, but of the client, who may waive it if he pleases.⁶

¹ *Waldron v. Ward*, Styl. 449; *Wilson v. Rastall*, 4 T. R. 753; *Footte v. Hayne*, Ry. & M. 165; *Taylor v. Foster*, 2 C. & P. 195; *Du Barré v. Livette*, 1 Peake, 77; *Greenough v. Gaskell*, 1 Myl. & K. 98; *Hibberd v. Knight*, 2 Exch. 11; *Cleane v. Jones*, 7 Exch. 421. See also *Introd.* pt. 2, § 53.

² *Taylor v. Foster*, 2 C. & P. 195.

³ *Du Barré v. Livette*, 1 Peake, 77.

⁴ *Parkins v. Hawkshaw*, 2 Stark. 239.

⁵ *Dwyer v. Collins*, 7 Exch. 639, and the cases there referred to; *Brown v. Foster*, 1 H. & N. 736.

⁶ *Tayl. Ev.* § 843, 4th Ed.

that the jury "tossed up" to see who the verdict should be for; *Vaise v. Delaval*, *ante*; mistake or misconduct; *Meade v. Smith*, *ante*; mistake; *Jackson v. Williamson*, *ante*; but as to any influences brought to bear upon them by the parties *outside* the jury room they may testify; *McDaniels v. McDaniels* 40 Vt.; thus, a juror may testify as to attempts to influence their verdict by third persons; *Cheeves v. Driver*, Cōxe (N. J.), 166; but not as to any actual misconduct of the jury; *State v. Andrews*, 29 Conn. 100; *Boston, etc., R. R. Co. v. Davee*, 1 Gray (Mass.), 83; *Meade v. Smith*, 16 Conn. 346; *Folsom v. Manchester*, 11 Cush. (Mass.) 334; *Little v. Larrabee*, 2 Greenl. (Me.) 37; *Vaise v. Delaval*, 1 D. & E. 11; *State v. Freeman*, 5 Conn. 348; on the grounds on which they predicated their verdict. *Sheldon v. Perkins*, 40 Vt.; *McDaniels v. McDaniels*, 42 Vt. A contrary rule would be opposed to public policy, and the stability and conclusiveness of legal proceedings; *Dorr v. Fenno*, 12 Pick. (Mass.) 528; *Murdock v. Sumner*, 22 id. 156; *State v. Freeman*, 5 Conn. 348; *Apthorp v. Backus*, Kirby (Ky.), 416; *Dana v. Tucker*, 4 Johns. (N. Y.) 437; *Dana v. Roberts*, 1 Root (Conn.), 135; *Clum v. Smith*, 5 Hill (N. Y.), 560.

Communications to medical men — not privileged.

§ 582. 2. Communications to a medical man, even in the strictest professional confidence, have been held not protected from disclosure,¹—a rule harsh in itself, of questionable policy, and at variance with the practice in France² (a) and in some of the United States of America.³

Communications to spiritual advisers — doubtful.

§ 583. 3. Whether communications made to spiritual advisers are, or ought to be, protected from disclosure in courts of justice presents a question of some difficulty. It is commonly thought that the decisions of the judges in the cases of *R. v. Gilham*⁴ and *R. v. Wild*,⁵ *added to some others that will be cited presently, have resolved this question in the negative; [* 725] and the practice is in accordance with that notion. But *R. v. Gilham* only shows that a confession of guilt made by a prisoner to the world or to a magistrate, in consequence of the spiritual exhortations of a clergyman that it will be for his soul's health to do so, is receivable in evidence against him — a decision perfectly well founded, because such exhortations cannot possibly be considered “*illegal* inducements to confess.” For by this

¹ *Dutchess of Kingston's case*, 20 Ho. St. Tr. 572 *et seq.*; *R. v. Gibbons*, 1 C. & P. 97.

² Bonnier, *Traité des Preuves*, § 179.

³ 1 Greenl. Ev. § 248, note (2), 7th Ed.; Appleton, *Evid. App.* 276.

⁴ 1 Moo. C. C. 186.

⁵ *Id.* 452.

(a) *Broad v. Pitt*, 3 Car. & P. 518; *Rex v. Gibbons*, 1 id. 97; *Huvett v. Prime*, 21 Wend. (N. Y.) 79

expression, as shown in a former chapter,¹ the law means language calculated to convey to the mind of a person accused or suspected of an offense, that by acknowledging guilt he will better his position with reference to the *temporal* consequences of that offense. And the ground on which the law rejects a confession, made after such an inducement to confess, is the reasonable apprehension that, in consequence of it, the party may have made a false acknowledgment of his guilt — an argument wholly inapplicable where he is only told that, by his avowing the truth, a *spiritual* benefit will accrue to him. *R. v.*

Wild is even less to the purpose; as the party who used the exhortation there neither was, nor professed to be, a clergyman, and, wholly unsolicited, thrust it on the prisoner. The other cases to which allusion has been made are an anonymous one in *Skinner*,² *R. v. Sparkes*.³ *Butler v. Moore*,⁴ and *Wilson v. Rastall*.⁵ In the first the question was respecting a confidential communication to a man of law, which Lord Chief Justice Holt, as might have been expected, held privileged from disclosure; adding *obiter* that it was otherwise “in the case of a gentleman, parson,” etc. The second and third are decisions, [* 726] one by Buller, J., *on circuit, and the other by the Irish Master of the Rolls, that confessions to a Protestant or Roman Catholic clergyman are not privileged; and in the fourth, the judges in banc say *obiter* that the privilege is confined to the cases of counsel, solicitor, and attorney. How far a particular form of religious belief being disfavored by law at the period

¹ *Suprà*, ch. 7, sect. 3, sub-sect. 2, § 551.

² *Skinn.* 404.

³ Cited in *Du Barré v. Livette*, 1 Peake, 77.

⁴ *MacNally's Evid.* 253.

⁵ 4 T. R. 753.

(A. D. 1802), affected the decision in *Butler v. Moore*, is not easy to say; but both that case and *R. v. Sparkes* leave the general question untouched; and on the latter case being cited to Lord Kenyon, in *Du Barré v. Livette*,¹ he said: "I should have paused before I admitted the evidence there admitted." He, however, decided that case on the ground that confidential communications to a legal adviser were distinguishable from others. It is also to be observed, that the subject coming incidentally before Best, C. J., in *Broad v. Pitt*,² very shortly after *R. v. Gilham*, he referred to that case as deciding that the privilege in question did not apply to a clergyman; but added, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but, if he chooses to disclose them, I shall receive them in evidence." In a case of *R. v. Griffin*,³ tried before Alderson, B., at the Central Criminal Court, part of the evidence against the accused consisted of certain conversations between her and her spiritual adviser, the chaplain of a work-house, relative to the transaction which formed the subject of accusation. On this evidence being offered, the judge expressed a strong opinion that it was not receivable, adding, however, "I do not lay this down as an absolute rule, but I think such evidence ought not to be given;" and the counsel for the prosecution accordingly withdrew it. The case is not fully reported, and the result is not stated. And lastly, in *R. v. Hay*,⁴ in an indictment for robbery of *a watch, the watch was traced to the possession of a Roman Catholic priest, who was called as [* 727] a witness for the prosecution; and who, on being asked

¹ 1 Peake, 77.

² 6 Cox, Cr. Cas. 219

³ 3 C. & P. 518.

⁴ 2 Fost. & F. 4.

"from whom did you receive that watch?" refused to answer, as he said he "received it in connection with the confessional." Hill, J., ruled that he was bound to answer, on the ground that the above question did not ask him to disclose any thing stated to him in the confessional; a decision apparently unimpeachable in itself, but which leaves the general question untouched.

§ 584. There cannot, we apprehend, be much doubt that, previous to the Reformation, statements made to a priest under the seal of confession were privileged from disclosure, except, perhaps, when the matter thus communicated amounted to high treason. In the old laws of Hen. I.¹ is this passage: "Caveat sacerdos ne de hiis qui ei confitentur peccata sua alicui recitet quod ei confessus est, non propinquis nec extraneis; quod si fecerit, deponatur, et omnibus diebus vite sue ignominiosus peregrinando poeniteat." The laws of Hen. I. are, of course, not binding per se, and are only valuable as guides to the common law; but it is otherwise with the statute *Articuli Cleri* (9 Edw. II.), c. 10, which is as follows:² "Quandoque aliqui confugientes ad ecclesiam * * * dum sunt in ecclesiâ custodiuntur per armatos infra cimiterium, et quandoque infra ecclesiam, ita arte quod non possunt exire locum sacrum causa superflui ponderis deponendi, nec permittitur eis necessaria victui ministrari. *Responsio*: * * * dum sunt in ecclesia, custodes eorum non debent morari infra cimiterium nisi

¹ *Leges Hen. 1*, c. 5, § 17.

² The above version of the statute is taken from the valuable work entitled "*Statutes of the Realm*, printed by command of his Majesty King George the Third, in pursuance of an Address of the House of Commons: From original Records and Authentic Manuscripts," A. D. 1810 *et seq.* It differs, in several respects, from that given by Sir Edward Coke in the 2nd Institute.

*necessitas vel evasionis periculum hoc requirat. Nec arcentur confugi dum sunt in ecclesia, quin [* 728] possint habere vite necessaria, et exire libere pro obsceno pondere deponendo. Placet etiam Domino Regi ut latrones appellatores, quandocumque voluerint, possint sacerdotibus sua facinora confiteri; *set caveant confessores ne erronee hujusmodi appellatores informant.*" In commenting on this statute, Sir Edward Coke, writing, be it remembered, after the Reformation, expresses himself as follows:¹ "Latrones vel appellatores. This branch extendeth only to thieves and approvers indicted of felony, but extended not to high treasons; for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the king and the whole realm; therefore this branch declareth the common law, that the privilege of confession extendeth only to felonies. And albeit, if a man indicted of felony becometh an approver, he is sworn to discover all felonies and treasons, yet he is not in degree of an approver in law, but only of the offense whereof he is indicted; and for the rest, it is for the benefit of the king to move him to mercy. So as this branch beginneth with thieves, extendeth only to approvers of thievery or felony, and not to appeals of treason; for, by the common law, a man indicted of high treason could not have the benefit of clergy (as it was holden in the king's time, when this act was made), nor any clergyman privilege of confession to conceal high treason. And so it was resolved in 7 Hen. V. (Rot. Parl. anno 7 Hen. V. nu. 13); whereupon friar John Randolph, the Queen Dowager's confessor, accused her of treason, for compassing of the death of the king. And so was it resolved in the

¹ 2 Inst. 629.

case of Henry Garnet (Hil. 3 Jac.), superior of the Jesuits in England, who would have shadowed his treason *under the privilege of confession, etc.; and [* 729] albeit this act extendeth to felonies only, as hath been said, yet the caveat given to the confessors is observable, *ne erronee informant.*" We cite this passage to show the common law on this subject; but it is very doubtful whether the caveat at the end of the above enactment was inserted to warn the confessor against disclosing the secrets of the penitent *to others*. The grammatical construction and context seem to show that it was to prevent his abusing his privilege of access to the criminal by conveying information to him from without; and the clause is translated accordingly in the best edition of the statutes.¹

§ 585. If it be an error to refuse to hold sacred the communications made to spiritual advisers, an opposite and greater error is the attempt to confine the privilege to the clergy of some particular creed. Courts of municipal law are not called on to determine the truth or merits of the religious persuasion to which a party belongs; or to inquire whether it exacts auricular confession, advises, or permits it — the sole question ought to be, whether the party who *bonâ fide* seeks spiritual advice should be allowed it *freely*. By a statute of New York,² "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or prac-

¹ The edition referred to in note 2, p. 1050. See also Ruffhead's edition of the Statutes, A. D. 1762.

² 1 Greenl. Evid. p. 326, § 247, note (1), 7th Ed.; Appleton, Evid. App. 275.

tice of such denomination." A similar statute exists in Missouri and some other States;¹ and the like principle is recognized in France.²

Social—Husband and wife—Secrets of business or friendship — not protected.

* § 586. *Social.* The applications of this principle to social life are few. The principal [* 730] instance is in the case of communications between husband and wife. Such, says Professor Greenleaf,³ (*a*) "belong to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband. Therefore, after the parties are

¹ 1 Greenl. Evid. p. 326, § 247, note (1), 7th Ed.; Appleton, Evid. App. 276, 277.

² Bonnier, *Traité des Preuves*, § 179, who adds, "Le système contraire détruirait la confiance, qui seule peut amener le repentir, en donnant au prêtre les apparences d'un délateur, d'autant plus odieux qu'il serait revêtu d'un caractère sacré."

³ 1 Greenl. Evid. § 254, 7th Ed.

(*a*) *Crook v. Henry*, 25 Wis. 564; *Odyell v. Bennett*, 7 Vt. 536; *State v. Phelps*, 2 Tyler (Vt.), 374; *Rea v. Tucker*, 51 Ill. 110; *Robinson v. Robinson*, 44 Ala. 227; *Anderson v. Anderson*, 9 Kan. 112; *Cook v. Cook*, 46 Ga. 308; *Spradling v. Conway*, 51 Mo. 51; *Taulman v. State*, 37 Ind. 353; *Brown v. Barrington*, 36 Vt. 40; *Bird v. Davis*, 1 McCarter (N. J.), 467; *Adams v. Adams*, 23 Ind. 50. Neither can the wife be a witness for the husband in an action against a person for criminal conversation with her. *Carpenter v. White*, 46 Barb. (N. Y.) 291; *Hicks v. Bradner*, 2 Abb. App. (N. Y.) 362.

separated, whether it be by divorce or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation." The 16 & 17 Vict. c. 83, which renders husbands and wives competent and compellable witnesses for or against each other in civil cases, contains a special enactment, sect. 3, that "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." And the evidence of neither husband nor wife will be received to disprove the fact of sexual intercourse having taken place between them '—a rule justly designated by Lord Mansfield as "founded in [* 731] decency, morality, and * policy."² But secrets disclosed in the ordinary course of business, or the confidence of friendship, are not protected.³ (a)

*Rejection of evidence tendered for expense, vexation,
or delay.*

§ 587. Courts of justice, as has been shown in the Introduction to this work,⁴ possess an inherent power of

¹ *R. v. Reading*, Cas. Temp. Hardw. 79; *R. v. Rook*, 1 Wils. 340; *R. v. Luffe*, 8 East, 192; *R. v. Kea*, 11 Id. 132; *Cope v. Cope*, 1 Moo. & R. 269; *R. v. Sourton*, 5 A. & E. 180; *Wright v. Holdgate*, 3 Carr. & K. 158.

² *Goodwright d. Stevens v. Moss*, Cowp. 594.

³ See the judgment of Lord Kenyon in *Wilson v. Rastall*, 4 T. R. 758; and the cases from the State Trials there referred to.

⁴ Introd. pt. 2, § 47.

(a) *Hoffman v. Smith*, 1 Caine's Cases (N. Y.), 157; *Webb v. Smith*, 1 C. & P. 337; *Lee v. Berrell*, 3 Camp. 337; *Lloyd v. Freshfield*, 2 C. & P. 325; *Falmouth v. Moss*, 11 Price, 455; *Vaillant v. Dodmead*, 2 Atk. 524.

rejecting evidence which is tendered for the purpose of creating expense, or causing vexation or delay. Such malpractices are calculated to impede the administration of the law as well as to injure the opposite party.

* CHAPTER IX.

[* 732]

AUTHORITY OF RES JUDICATA.

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Maxim "Res judicata pro veritate accipitur."

§ 588. The maxim "Res judicata pro veritate accipitur" is a branch of the more general one, "Interest reipublicæ ut sit finis litium;" and the reasons which have led to the universal recognition of both are explained in the Introduction to this work.

Res judicata.

§ 589. "Res judicata," says the Digest,³ "dicitur, quæ finem controversiarum pronuntiatione judicis acci-

¹ Introd. pt. 2, § 44.

³ Dig. lib. 42, tit. 1, l. 1.

² Introd. pt. 2, §§ 41, 43.

pit; quod vel condemnatione vel absolutione contingit." But in order to have the effect of *res judicata*, the decision must be that of a court of competent jurisdiction, concurrent or exclusive,—"*judicium à non suo iudice datum, nullius est momenti.*"¹ The decisions of [* 733] *such tribunals are *conclusive* until reversed; but no decision is *final* unless it be pronounced by a tribunal from which there lies no appeal, or unless the parties have acquiesced in the decision, or the time limited by law for appealing has elapsed.² Moreover, the conclusive effect is confined to the point actually decided; and does not extend to any matter which came collaterally in question.³(a) It does, however, extend to

¹ 10 Co. 76 b.

² 1 Ev. Poth. Part 4, ch. 3, sect. 3, art. 1.

³ Per de Grey, C. J., delivering the opinion of the judges to the House of Lords in the *Duchess of Kingston's case*, 11 St. Tr. 261; 1 Rol. Ab. 876; *Blackham's case*, 1 Salk. 290-1; *R. v. Knappstoff*, 2 B. & C. 883; *Carter v. James*, 13 M. & W. 137.

(a) A judgment in an action of trespass is admissible in an action of ejectment between the same parties or their privies; *Calhoun v. Dunning*, 4 Dall. (U. S.) 120; *Offut v. John*, 80 Mo. 120; *Janes v. Buzzard*, Hempstead (Tenn.), 240; *Garratt v. Johnson*, 11 Gill. & J. (Md.) 173; *Welsh v. Linde*, 1 Cranch (U. S. C. C.), 508; so where a note, upon which an action is brought, is adjudged to be a forgery in an action thereon against the supposed maker, the record of such judgment is evidence of such forgery in an action against the person from whom it was taken for the original consideration. *Pope v. Nance*, 1 Stew. (Ala.) 354. It is always proper, however, to produce the entire judgment to show to what it applies in fact; *Easby v. Dye*, 14 Ala. 158; *Smith v. Smith*, 22 Iowa, 516; and the whole record *must* be produced when it is used to show what facts were adjudicated. *Lee v. Lee*, 21 Mo. 531. Where a person sues on a promise of indemnity, against the claim of a third person, a judgment in favor of such third person, against him, is admissible as, and conclusive evidence of, the validity of such claim. *Weld v. Nichols*, 17 Pick. (Mass.) 488. A judgment between the same parties, in a personal action, is a bar to another action for the same claim between the same parties; *Lawrence v. Vernon*, 3 Sumn. (U. S.) 20; and where an action has been brought for an injury to a particular right the record of a former judgment, between the same parties for the same

any matter which it was necessary to decide, and which was actually decided, as the ground-work of the decision itself, though not then directly the point at issue.¹(a)

Difference between the substantive and judicial portions of a record.

§ 590. The principle in question must not be confounded either with the rule of law which requires records to be in writing,² or with its conclusive presumption that they are correctly made.³ The mode of proving judicial acts is a different thing from the effect of those acts when proved; and the rules regulating the effect of *res judicata* would remain exactly as they are, if the decisions of our tribunals could be established by

¹ *R. v. Hartington Middle Quarter*, 4 E. & Bl. 780, 794.

² Bk. 2, ch. 3, sect. 1, § 218.

³ *Supra*, ch. 2, sect. 2, sub-sect. 3, § 348.

injury, is conclusive. But if the right or the violation has been essentially varied since the former judgment, the judgment is only evidence, and is not conclusive. *Holler v. Pine*, 8 Blackf. (Ind.) 175.

The test, as to whether the actions are for the same cause, is, whether the same evidence will sustain both actions. If so, they are regarded as for the same cause, otherwise not; *Lawrence v. Vernon*, 3 Sumn. (U. S.) 20; and a judgment not conclusive *for* is not conclusive *against* a party. *Southgate v. Montgomery*, 1 Paige's Ch. (N. Y.) 41. A judgment imports absolute verity, and cannot be impeached. But the court may inquire into the jurisdiction of the court rendering it, and the fact of jurisdiction should appear from the record. If there was no jurisdiction the judgment is a nullity, and is not evidence for any purpose. *Custis v. Turnpike Co.*, 2 Cranch (U. S. C. C.), 81; *Lincoln v. Tower*, 2 McLean (U. S.), 473.

Parties who are not privies to the judgment are not bound thereby. Thus, the judgment of a court establishing a certain boundary is not conclusive upon parties owning lands adjoining; *Lawrence v. Haynes*, 5 N. H. 33; and a judgment not conclusive *for* is not conclusive *against* a party. *Lawrence v. Roberts*, 2 Overton (Tenn.), 236.

(a) *Duney v. Osborn*, 4 Cow. (N. Y.) 329; *Dane v. Wingate*, 12 N. H. 29; *Phillips v. Berick*, 17 Johns. (N. Y.) 136; *Graves v. Joyce*, 5 Cow. (N. Y.) 261.

oral testimony.¹ In truth, the record of a court of justice consists of two parts, which may be nominated respectively the *substantive* and *judicial* portions. In the former — the *substantive* portion — the *court [* 734] records or attests its own proceedings and acts. To this, unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects,² nor the facts, thus recorded or attested, to be proved in any other way than by production of the record itself, or by copies proved to be true in the prescribed manner:³ “*Nemo potest contra recordum verificare per patriam.*”⁴ “*Quod per recordum probatum, non debet esse negatum.*”⁵ In the *judicial* portion, on the contrary, the court expresses its judgment or opinion on the matter before it. This has only a conclusive effect between, and indeed in general is only evidence against, those who are parties or privies to the proceeding.⁶ The distinction rests on sound reason. The duty of the court is to give judgment solely according to the arguments used, and the evidence, both in chief and on cross-examination adduced before it — *de non apparentibus et non existentibus eadem est ratio;*⁷ add to which,

¹ The ancient laws of Wales required in general the testimony of two witnesses, but one of the exceptions to this rule was the case of a judge respecting his judgment. “If,” says the Venedotian Code, bk. 2, c. 4, § 4, “one of two parties, between whom a lawsuit has taken place, deny the judgment, and the other acknowledge it, the statement of the judge is in that case final respecting his judgment.” See, also, the Dimetian Code, bk. 2, ch. 5, § 4.

² Co. Litt. 260 a; Finch, Law, 231; Gilb. Ev. 7, 4th Ed.; 4 Co. 71 a; Litt. R. 155; Hetl. 107; 1 East, 355; 2 B. & Ad. 362.

³ See several instances collected, 1 Phill. Ev. 441, 10th Ed.

⁴ 2 Inst. 380.

⁵ Branch, Max. 186.

⁶ 2 Smith, Lead. Cas. 661, 664 *et seq.*, 5th Ed.; per De Grey, C. J., in the *Duchess of Kingston's case*, 11 St. Tr. 261; B. N. P. 231-2.

⁷ Introd. pt. 2, § 38.

that in most cases the party against whom judgment is pronounced has an appeal to a superior tribunal. A judgment, therefore, between two persons is not only *res inter alios judicata*, with respect to a third who was neither party nor privy to the proceedings; but is *res inter alios acta* in its most dangerous form, as being apparently attested by the authority of the administrators of the law. Bentham contends that *res inter alios judicata* ought to be admitted, and its weight estimated by the jury;¹ but — without stopping to inquire whether the cases in which it is receivable as evidence between third parties might properly be extended — the general * principle running through our law, which requires the best evidence,² and rejects all evidence [* 735] where there is no reasonable and proximate connection between the principal and evidentiary facts,³ is quite as applicable to *res judicata* as to any other species of proof. (a)

Judgments null in respect of what is contained in them
— *Verdicts* — *Awards*.

§ 591. But the judgment of a tribunal of competent jurisdiction may be null and void in itself, in respect of what is contained in it.⁴ 1. When the object of the decision it pronounces is uncertain — “*Sententia debet esse certa* ;” — *e. g.*, a judgment condemning the defendant to pay the plaintiff what he owes him would be void ;

¹ 3 Benth. Jud. Ev. 431-2.

² Bk. 1, pt. 1, §§ 87 *et seq.*, and *suprà*, § 293.

³ Bk. 1, pt. 1, §§ 88, 90.

⁴ 1 Ev. Poth. Part. 4, ch. 3, sect. 3, Art. 2, § 1, N. 18. See also per Parke, B., in *R. v. Blakemore*, 2 Den. C. C. 420, 421.

(a) Thus the conviction of a principal is evidence of such conviction on the trial of an accessory, but is neither evidence of the *guilt* of the principal or of the accessory. *Kithler v. State*, 18 Miss. 192. See also *Lawrence v. Haynes*, 5 N. H. 33, as to effect of judgment upon those not parties thereto.

though it would be sufficient if it condemned the defendant to pay what the plaintiff demanded of him, and the cause of demand appeared on the record of the proceedings.¹ 2. When the object of the adjudication is any thing impossible² — “*Lex non cogit impossibilia.*”³ 3. When a judgment pronounces any thing which is expressly contrary to the law, *i. e.*, if it declares that the law ought not to be observed; — if it merely decides that the case in question does not fall within the law, though in truth it does so, the judgment is not null, it is only improper, and consequently can only be avoided by the ordinary course of appeal.⁴ 4. When a judgment contains inconsistent and contradictory dispositions.⁵ 5. When a judgment pronounces on what is not in demand.⁶ — “*Judex non reddit plus, quàm quod petens ipse requirit,*” and “*Droit ne done plus que soit demande.*”⁷

[* 736] *The same principles apply to other things which partake of the nature of judgments. Thus a verdict that finds matter uncertainly or ambiguously is insufficient,⁸ and the same holds when it is inconsistent.⁹ In the 11 Hen. IV. 2 A. pl. 3, on the trial of a writ of conspiracy against two, the jury found one guilty and the other not, whereupon the presiding judge¹⁰ said to them, “*Vous gents, vře verdict est contrariant en luy m̃, car si l’un ne soit my culp̃, ambid̃ sont de rien culp̃,*

¹ 1 Ev. Poth. *in loc. cit.*

² Id. N. 21.

³ Hob. 96.

⁴ 1 Ev. Poth. *in loc. cit.* N. 22.

⁵ Id. N. 23; *Cooper v. Langdon*, 10 M. & W. 785.

⁶ 1 Ev. Poth. *in loc. cit.* N. 24.

⁷ 2 Inst. 286.

⁸ Co. Litt. 227 a.

⁹ 48 Edw. III. 25 a; Hob. 262.

¹⁰ The book says Thir. Qu. Thirning, C. J., or Thirwit, J. ? Both seem to have been on the bench at that time. See Dugdale, Orig. Jud.

̃ p̃ c̃ q̃ le b̃re sup̃p̃ q̃ ils conspir̃ ensemble, ches̃c̃ ove aut̃, mes pur ce que vous n'estes appritz de ley, soit melior aviz de ṽre verdit, etc." So if a verdict pronounces on what is not in issue.¹ A verdict concluding against law is void;² but when a jury find matter of fact and conclude against law, the verdict is good and the conclusion ill.³ (a) And, lastly, of awards. It is a principle that awards must be certain;⁴ and if an award contains inconsistent provisions,⁵ or directs what is impossible,⁶ or what is illegal,⁷ it cannot be enforced by action, and will generally be set aside on motion. (b)

Cases where the maxim applies — The thing must be the same — The person must be party or privy to the judgment.

§ 592. "Cum quæritur," again to quote from the Digest,⁸ "hæc exceptio" (scil. rei judicatæ) "noceat, necne? inspicendum est, an idem corpus sit: quantitas

¹ 1 Leon. 67, pl. 86; Hob. 53; 1 Rol. 257.

² 22 Ass. pl. 60; 28 Id. pl. 4; Hob. 112-13.

³ Plowd. 114; Dy. 106 b, pl. 20; 194 a, pl. 32; Jenk. Cent. 1, Cas. 35; 4 Mod 10.

⁴ Watson, Awards, 204, 3rd Ed.; Russ. Arbitr. 275, 3rd Ed.

⁵ Id. 289.

⁶ Id. 288; Wats. Awards, 234, 3rd Ed.

⁷ Russ. Arb. 391, 3rd Ed.; Wats. Awards, 234, 3rd Ed.

⁸ Dig. lib. 44, tit. 2, ll. 12, 13, 14. See also 1 Ev. Poth. Part 4, ch. 3, sect. 3, art. 4, N. 40; Bonnier, Traité des Preuves, § 683; Code Civil, liv. 3, tit. 3, ch. 6, sect. 3.

(a) A verdict of itself is not evidence for any purpose, nor can it be given in evidence unless it is followed by a judgment upon it; *Hinkle v. Carruth*, Tread. (S. C.) 471; *Donaldson v. Jude*, 2 Bibb (Ky.), 57; *Mahoney v. Ashton*, 4 Har. & M. (Md.) 295; *Read v. Stanton*, 3 Hayw. (Tenn.) 159; but when a judgment is rendered thereon, it is conclusive evidence, of all the facts it purports to cover, between the parties to the suit and their privies. *Preston v. Harvey*, 2 H. & M. (Va.) 55.

(b) *Elliott v. Heath*, 14 N. H. 131; *Gannon v. Anderson*, 39 Penn. St. 274. But after judgment has been entered upon it, the judgment is conclusive of all the facts covered by the award. *Warner v. Scott*, 39 Penn. St. 274.

eadem, idem jus; et an eadem causa petendi, et eadem
 [* 737] *conditio personarum: quæ nisi omnia concur-
 rent, alia res est." First, then, the *thing* must
 be the same: but this must not be understood too liter-
 ally. For instance, although the flock which the plain-
 tiff demands now does not consist of the same sheep as
 it did at the time of the former demand, the demand is
 for the same thing, and therefore is not receivable.¹ But,
 secondly, the chief matter to be attended to is, whether
 the *person* whom it is sought to affect by a judgment
 was either party or privy to the proceedings in which it
 was given; in which case alone is it in general even
 receivable in evidence against him.² It is on this princi-
 ple that a judgment against a party in a criminal case is
 not evidence against him in a civil suit,³ or vice versa;⁴
 for the parties are not the same; and the proceedings on
 an indictment were not evidence in appeal.⁵

Exceptions — Judgments in rem — Other instances.

§ 593. An important exception to this rule exists in
 the case of judgments *in rem*—*i. e.*, adjudications pro-
 nounced upon the *status* of some particular subject-matter,
 by a tribunal having competent authority for that pur-
 pose.⁶ Such judgments the law has, from motives of
 policy and general convenience, invested with a conclu-
 sive effect against all the world. At the head of these
 stand judgments in the Exchequer of condemnation of
 property as forfeited, adjudications of a Court of Admi-

¹ 1 Ev. Poth. Part 4, ch. 3, sect. 3, art. 4, § 1, N. 41.

² *Suprà*, § 590.

³ See Tayl. Ev. § 1505, 4th Ed.; Stark. Ev. 361, 4th Ed.; 2 Phill. Ev. 27, 10th Ed.

⁴ Tayl. Ev. § 1505, 4th Ed.; Stark. Ev. 332, 4th Ed. "Acta facta in causa civili non probant in judicio criminali." Masc. de Prob. Concl. 34, N. 1.

⁵ *Samson v. Yardly*, 2 Keb. 223.

⁶ 2 Smith's Lead. Cas. 662, 5th Ed.

rality on the subject of prize, etc. In certain instances, also, judgments as to the status or condition of a party are receivable in evidence against third persons, although *they are not conclusive. Thus, in an action against an executor sued on a bond of his testa- [* 738] tor, a commission finding the testator lunatic at the time of the execution of the bond, is *prima facie* evidence against the plaintiff, though he was no party to it.¹(a) And, by analogy to the general rule of *res inter alios acta*, judgments and judicial proceedings *inter alios* are receivable on questions of a public nature, and in other cases where the ordinary rules of evidence are departed from.² Judgments not *in rem* are said to be judgments *in personam*.³

Judgments to be conclusive must be pleaded, if there be opportunity.

§ 594. Conclusive judgments are a species of estoppels; seeing that they are given in a matter in which the person against whom they are offered as evidence has had, either really or constructively, an opportunity of being heard, and disputing the case of the other side. There is certainly this difference, that estoppels are usually founded on the voluntary act of a party; whereas it is a *præsumptio juris* that "*judicium redditur in invitum*."⁴ More-

¹ *Faulder v. Silk*, 3 Campb. 126; *Dane v. Lady Kirkwall*, 3 C. & P. 683.

² *Suprà*, ch. 5, § 510.

³ J. W. Smith's *Lead. Cases*, 661, 5th Ed., suggests that *inter partes* would be better; but the classification of judgments into those *in rem*, and those *in personam*, has been recognized by statute. See 24 & 25 Vict. c. 10, s. 35.

⁴ Co. Litt. 248 b; 5 Co. 28 b; 10 Id. 94 b. According to some foreign jurists, judgments partake of the nature of contracts. "Cette importante présomption (autorité de la chose jugée) se rattachant au fond du droit, autant qu'à la preuve, les règles sur l'effet des jugements, c'est à dire sur les personnes et sur les objets auxquels elle s'applique, reposent sur les mêmes bases que les règles sur l'effet des conventions. On l'a souvent dit avec raison *judiciis contrahimus*:" Bonnier, *Traité des Preuves*, § 680.

over, when judgment has been obtained for a debt, no other action can be maintained upon it while the judgment is in force, "*quia transit in rem judicatam*."¹ Like other estoppels by matter of record and estoppels [* 739] * by deed, judgments, in order to have a conclusive effect, must be pleaded if there be opportunity, otherwise they are only cogent evidence for the jury.² (a)

¹ Pollexf. 641. See, also, 6 Co. 46 a.

² 2 Smith's Lead. Cas. 670, 673, 5th Ed.; and *suprà*, ch. 7, sect. 2, § 544.

(a) A judgment between the same parties is conclusive as to them and their privies in interest as to all matters covered by the judgment, or rather as to all matters involved and adjudicated in the action before a court of competent jurisdiction; *Maloney v. Horan*, 49 N. Y. 111; *Shepardson v. Carey*, 29 Wis. 34; *Finney v. Boyd*, 26 Wis. 366; *Rogers v. Higgins*, 57 Ill. 244; *Phelan v. Gardner*, 43 Cal. 306; *Chesapeake, etc., Co. v. Gittings*, 36 Md. 276; *Mattingley v. Nye*, 8 Wall. (U. S.) 370; *Niller v. Johnson*, 27 Md. 6; *McNamee v. Moreland*, 26 Iowa, 96; *Danaher v. Prentiss*, 22 Wis. 111; and the effect of the adjudication cannot be avoided by a change of forum, from the equity to the law side of the court, nor *vice versa*; *Baldwin v. McCrea*, 38 Ga. 650; but this must be understood as applicable only to those matters which were set up and adjudicated upon the merits, which, under the pleadings, were made a part of the issue; as to merely collateral matters, it has no binding effect. *Fisk v. Lightner*, 44 Mo. 286. In *Aurora City v. West*, 7 Wall. (U. S.) 82, it was held by the court that "whatever is fairly within the scope of the pleadings in a suit is concluded by the judgment;" and in this respect there is no distinction between the judgment of a court of law and a decree of a court of equity. So long as they stand unreversed, they are equally conclusive. *Foster v. The Richard Busteed*, 100 Mass. 409; *Law v. Mussey*, 41 Vt. 393; *Baulder v. Lanahan*, 29 Md. 200; *Coultas v. Green*, 43 Ill. 277; *Howard v. Whitman*, 29 Ind. 557. A final decree in a court of equity is invested with all the attributes of a judgment, and operates as a complete bar to a relitigation of the question involved as a judgment at law, *Maguire v. Tyler*, 40 Mo. 406; *Kelsey v. Murphy*, 26 Penn. St. 78; *Evans v. Tathem*, 9 S. & R. (Penn.) 261; and is conclusive as an estoppel, if a valid decree obtained before a court having jurisdiction of the parties, whether rendered in the courts of another State or a domestic judgment. *Evans v. Tathem, ante*; *Law v. Mussey, ante*; *Burden v. Fitch*, 15 Johns. (N. Y.) 144; *Andrews v. Montgomery*, 19 id. 162; *Mills v. Durkee*, 7 Cranch (U. S.), 481; *Bissell v. Briggs*, 9 Mass. 462. Indeed, it may be said that a decree of a court of equity or a judgment of a court of law rendered by a court having jurisdiction of the parties is conclusive upon them and their privies, in all questions where the same issue is involved, or the

Judgments may be impeached for fraud.

§ 595. The general maxims of law, "*Dolus et fraus nemini patrocinentur*,"¹ "*Jus et fraus nunquam cohabitant*,"² "*Qui fraudem fit frustra agit*,"³ apply to the de-

¹ 14 Henry VIII. 8 a; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

² 10 Co. 45 a.

³ 2 Rol. 17.

same comes incidentally in question, so long as the same is not suspended or reversed; *Waugh v. Chauncey*, 13 Cal. 12; *Garwood v. Garwood*, 29 id. 521; *Demerritt v. Lyford*, 27 N. H. 541; and this is true equally of an award of arbitrators or any tribunal to whose adjudication the parties have mutually submitted their rights in such a manner as to invest it with jurisdiction over the subject-matter. *Waugh v. Chauncey*, *ante*. In *U. S. v. Arredondo*, 6 Peters (U. S.), 729, Mr. Justice Baldwin says: "It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, *and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion, within the authority and power conferred*. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial or special, unless an appeal is taken; and in order to operate as a bar, the judgment or decree must on its face appear to have been rendered by a court of competent jurisdiction, and must appear or be shown to have involved the very matter in question; *Geary v. Simmons*, 39 Cal. 224; *Cannon v. Brame*, 45 Ala. 262; *Spencer v. Dearth*, 43 Vt. 98; *Miller v. Draver*, 30 Ind. 371; and upon the merits. A judgment or decree upon a merely collateral matter is not a bar to another action between the parties upon the merits, and has no effect upon the actual rights of the parties involved in the *merits* of the action. *Wells v. More*, 49 Mo. 229; *Foster v. The Richard Busteed*, *ante*; *Vaughan v. O'Brien*, 57 Barb. (N. Y.) 491. Thus a judgment upon a dilatory plea is no bar to another action upon the merits; *Vaughan v. O'Brien*, *ante*; *Stockwell v. Bryne*, 22 Ind. 6; nor upon a demurrer, unless the demurrer went to the merits; *Spicer v. U. S.*, 5 Ct. of Claims, 34; *Allison v. Hess*, 28 Iowa, 388; nor a judgment obtained by fraud; *Dunlop v. Cady*, 31 Iowa, 260; *Cowep v. Toole*, id. 516; *Whetstone v. Whetstone*, id. 276; *Creager v. Walker*, 7 Bush (Ky.), 1; *Ellis v. Kelly*, 8 id. 621; nor a judgment of nonsuit, unless there had first been a trial upon the merits; *Gillilan v. Spratt*, 8 Abb. Pr. (N. Y.) N. S. 13; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; nor where an action is dismissed for want of parties; *Wheeler v. Ruckman*, 7 Robt. (N. Y.) 347; *Mechanics*, etc., *Ass'n v. Mariposa Co.*, id. 225; even though the order purports to be a judgment on demurrer, but the records show that it was based on facts that arose subsequent to the bringing of the action; *Gibson v. Milne*, 1

cisions of tribunals.¹ Lord Chief Justice de Grey, in delivering the answer of the judges to the House of Lords in the *Duchess of Kingston's case*,² speaking of a certain

¹ 3 Co. 78 a; *The Duchess of Kingston's case*, 11 St. Tr. 262; *Brownsword v. Edwards*, 2 Vez. 246; *Earl of Bandon v. Becher*, 3 Cl. & F. 479; *Harrison v. The Mayor of Southampton*, 4 De G., M. & G. 148.

² 11 St. Tr. 262.

Nev. 526; or any merely collateral question; *Durant v. Essex Co.*, 7 Wall. (U. S.) 107; or reversed by a higher tribunal. *Aurora City v. West*, 7 Wall. (U. S.) 82. Nor is a former judgment between the same parties a bar to an action accruing subsequently upon the same subject-matter. *Jones v. Petatuma*, 36 Cal. 231. Difference in the *form of action* is not the test, but whether the former judgment was for the same *cause, and involved the same issue*. Thus a judgment in an action of slander, for speaking certain slanderous words respecting the plaintiff, is a bar to another action for the *same* speaking, but it is not a bar to an action for the speaking of the *same* words at a time subsequent to the bringing of the action. The utterance of the same words after the suit has terminated is an independent cause of action; *Rockwell v. Brown*, 36 N. Y. 207; nor if the judgment is so defective that it cannot be enforced; *Wixom v. Stephens*, 17 Mich. 518; *Carpenter v. Smith*, 24 Iowa, 200; nor if the judgment upon its face is void. It is not necessary that the cause of action should be the same in the first suit as in the second. The test is whether the *issue* is the same; *Lynch v. Swanton*, 53 Me. 100; *Krenchi v. Dehler*, 50 Ill. 176; and if the record does not sufficiently show what the issue covered, or what was adjudicated in the action, it may be shown by parol; *Walker v. Chase*, 53 Me. 258; *Burwell v. Knight*, 51 Barb. (N. Y.) 267; *Duncan v. Stokes*, 47 Ga. 593; *Miller v. Deaver*, 30 Ind. 371; *Warner v. Mullane*, 23 Wis. 450; but see *The Vincennes*, 3 Ware (U. S.), 171, where it was held that, if a former judgment is relied upon, the record should show that the matter in question was actually set up and passed upon, and not merely that it *might* have been. The test of the conclusiveness of a judgment is not always what was actually adjudicated, but what matters the parties *were bound to have adjudicated in the action*, or be estopped from asserting any right under them; *Merriam v. Woodcock*, 104 Mass. 326; *Newton v. Hook*, 48 N. Y. 676; *Reformed, etc., Church v. Brown*, 54 Barb. (N. Y.) 191; *Gates v. Preston*, 45 N. Y. 113; or to matters actually adjudicated, although the party need not have presented them, and did not claim a recovery upon them, although presented. *Gates v. Preston, ante*; *Merriam v. Woodcock ante*. But a judgment in a collateral proceeding, in the same action as the holding or discharging of a trustee in an action, where such proceedings are allowed, does not conclude the principal debtor in the action from bringing an action against the trustee to recover a sum in addition to that covered by his disclosure in the action. In order to make a judgment conclusive, the parties must be shown by the record to have been in a situation to settle all their rights

sentence of a spiritual court, says: "If it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was *mistaken*, it may be shown that they were *misled*. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice." In such cases, as has been well expressed, the whole proceeding was "*fabula, non iudicium*."¹ The principle applies to every species of judgment; to judgments of courts of exclusive jurisdiction;² to judgments in rem;³ to judgments of foreign tribunals,⁴ and even to judgments * of the House of Lords.⁵ On an indictment for perjury, the record of the proceedings [* 740] at the trial, with the finding of the jury and judgment of the court thereon in accordance with the evidence given by the accused, is no defense.⁶ It is perhaps needless to add, that a supposed judicial record offered in evidence may be shown to be a forgery.⁷ (a)

¹ 4 De G., M. & G. 148. See Macqueen, Law of Marriage, Divorce, and Legitimacy, 2nd Ed., p. 68.

² *Meddowcraft v. Hugenin*, 3 Curt. 403.

³ *In re Place*, 8 Exch. 704, per Parke, B.

⁴ *Bank of Australasia v. Nias*, 16 Q. B. 717.

⁵ *Sheddon v. Patrick*, 1 Macq. Ho. Lo. Cas. 535.

⁶ Hob. 201; *Titus Oates' case*, 10 Ho. St. Tr. 1136-7.

⁷ *Noell v. Wells*, 1 Sid. 359.

in the action, and this is never the case in collateral proceedings instituted by third persons. *Dobbins v. Hyde*, 37 Mo. 114.

(a) Judgments may be attached by those not parties or privies thereto, as being fraudulent and collusive. *Malone v. Kitching*, 10 La. Ann. 85; *Dunn v. Woodward*, 11 id. 265; *Hudson v. Connolly*, 5 id. 400; and are in nowise binding upon them. So, too, it may be shown that a note or other obligation was obtained by fraud, or that it was never delivered to the payee, even though the note or obligation is in the hands of a holder for value. Thus, when the

[* 741]

* CHAPTER X.

QUANTITY OF EVIDENCE REQUIRED.

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payee obtains the signature of a person to a note or obligation by fraud as to the character of the paper itself, and the person had no intention or expectation of signing such a paper, and who is guilty of no negligence in affixing his signature, or in the character of the instrument, he is not bound thereby, and he may impeach the note or obligation by parol proof in these respects. *Cline v. Guthrie*, 42 Ind. 222; 13 Am. Rep. 358; *Caulkins v. Whisler*, 29 Iowa, 495; 4 Am. Rep. 237; *Walker v. Ebert*, 29 Wis. 194; 9 Am. Rep. 548; *Foster v. Mackinson*, 4 Law Rep., C. P. 704; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477; *Putnam v. Sullivan*, 4 Mass. 45; *Taylor v. Atchinson*, 54 Ill. 196; 15 Am. Rep. 118; *Wait v. Pomeroy*, 20 Mich. 425; 4 Am. Rep. 395. So to show that it was never delivered and either fact established by the defendant is a bar to the recovery. *Cline v. Guthrie*, 42 Ind. 222; 13 Am. Rep. 358; *Thomas v. Watkins*, 16 Wis. 549; *Carter v. McClintock*, 29 Mo. 464; *Mahon's Adm'r v. Sawyer*, 18 Ind. 73.

General rule — No particular number of instruments of evidence required for proof or disproof.

§ 596. The last subject that offers itself to our attention in this part of the work is the *quantity* of legitimate evidence required for judicial decision. This is governed by a rule of a negative kind, which, in times past at least, was almost peculiar to the common law of England,¹ * namely, that in general no particular number of instruments of evidence is necessary for proof [* 742] or disproof,—the testimony of a single witness, relevant for proof of the issue in the judgment of the judge, and credible in that of the jury, is a sufficient basis for decision, both in civil and criminal cases.² And, as a corollary from this, when there is conflicting evidence the jury must determine the degree of credit to be given to each of the witnesses; for the testimony of one witness may in many cases be more trustworthy than the opposing testimony of many.³ The rule has been expressed “ponderantur testes, non numerantur;”⁴ but “testimonia” or “probationes” would be better than “testes,” as it is clearly not confined to verbal evidence. (a)

¹ The Hindu law seems the reverse of ours:—where the testimony of a single witness is sufficient it is the exception, not the rule. See Translation of Poptee, c. 3, sect. 8, in Halhed’s Code of Gentoo Laws.

² 3 Blackst. Com. 370; Stark. Evid. 827, 4th Ed.; Trials per Pais, 363; Peake’s Ev. 9, 5th Ed.; Co. Litt. 6 b; Fost. C. L. 233; 2 Hawk. P. C. c. 25, s. 131, and c. 46, s. 2.

³ Stark. Evid. 832, 4th Ed.

⁴ Id. “Testimonia ponderanda sunt, non numeranda,” is found in the Scotch law authorities. Halk. Max. 174; Ersk. Inst. bk. 4, tit. 2, § 26.

(a) By preponderance of evidence is meant a preponderance in its *weight*, and not in the number of witnesses. Circumstances may be stronger than direct testimony. Indeed, they may be so strong as to entirely overcome the force of and outweigh direct evidence; *Bowie v. Maddox*, 29 Ga. 385; and,

Almost peculiar to the common law of England—Arguments in favor of requiring a plurality of witnesses—Arguments against it.

§ 597. We have said that this rule is a distinguishing feature in our common-law system. The Mosaic law

while no positive test can be given to determine their value in a given case, and their force in each case must depend upon the peculiar circumstances elicited, yet it is safe to say that with such evidence, as indeed with *all* evidence, it must be such as to satisfy the mind and conscience of the jury. This is the only general test that can be given, but in all cases a jury should, before rendering a verdict, be sure that the evidence has this effect. *Burrell v. State*, 18 Tex. 718.

Evidence need not be indubitable or irrefragable, but it should be such as satisfies the jury that, upon the case as it stands, the party in whose favor the verdict is given is entitled to it; *Durham v. Taylor*, 29 Ga. 166; and the party upon whom the burden of proof rests being bound to make out his case by a preponderance of proof, in a case where the proof is balanced, the verdict should be for the other party; *Graves v. Ransom*, MSS. case, Vt. Sup. Ct., 1861; and, while generally the mere number of witnesses is not decisive, yet, when a number of witnesses of equal apparent intelligence and credibility are opposed to each other as to the principal fact, and there are no circumstances giving the one side any special claim to credence over the other, the largest number should prevail. *Vaughn v. Parr*, 20 Ark. 600.

In reference to the value of circumstantial evidence, and in determining where the weight of evidence lies, the late President Lincoln used to relate an anecdote of a test given by him to a jury before whom he was trying a case, which, in that case at least, proved decisive, and which, although expressed in the quaint style peculiar to western lawyers in those days, embodies the *true* test in all cases. It seems that his client had lost a suckling colt from his field, and, as a more sure means of finding the colt and of identifying it, he saddled the colt's mother and started off in search of it. After having visited several farms he finally entered the plaintiff's field, where there were a large number of horses and colts, where he saw a colt that he believed to be his. He rode the mare into the drove and as soon as the mare saw the colt she gave a sign of recognition, and the colt immediately responded to it by not only approaching the mother, but by following her against all the attempts of the plaintiff and his men to stop it. The plaintiff insisted that the colt was his, and that he had raised it from one of the mares then in the field. But the defendant could not be convinced that his eyes deceived him, and rode the mare into the field, feeling sure that the colt would recognize its mother and follow her. The sequel proved the truth of his convictions, and when the plaintiff saw the re-

in some cases,¹ and the civilians and canonists in all,*
 *exacted the evidence of more than one witness,
 a doctrine adopted by most nations of Europe, [* 743]

¹ See the next note.

* Their maxim is well known, "Unius ominò testis responsio non audiat, etiamsi præclaræ curiæ honore præfulgeat:" Cod. lib. 4, tit. 20, l. 9, § 1. See also Id. l. 4; Huberus, Præl. Jur. Civ. lib. 22, tit. 5, N. 18; Decretal, Gregor. IX. lib. 2, tit. 20, c. 23; and *suprà*, Introd. pt. 2, §§ 66 *et seq.* Bonnier, in his *Traité des Preuves*, § 201, labors hard, and apparently with success, to show that the lawyers of ancient Rome did not establish this rule, which he considers the production of the lower empire. He argues that all the expressions to be found in the *Corpus Juris Civilis* of an anterior date, which seem to require a plurality of witnesses, must be understood in the sense of cautions to the judge, and not as positive rules of law. The following passage is certainly very shrewd and forcible: Ce n'est que sous Constantin que nous voyons l'exclusion " (of the testimony of a single witness), "nettement formulée; et encore l'empereur n'en vint il là qu'à la suite d'une première constitution, qui recommandait seulement aux juges d'être circonspects: *Simili modo sancimus*, l. 9, § 1, Cod. de testib (Cod. lib. 4, tit. 20, l. 9, § 1, already cited in this note) *ut unius testimonium nemo iudicum in quacunque causâ facile patiaturs admitti. Et nunc manifestè sancimus, ut unius omninò testis responsio non audiat, etiamsi præclaræ curiæ honore præfulgeat.* C'est donc au Bas Empire qu'appartient l'introduction de la maxime *testis unus testis nullus.*" The French author is not peculiar in this view; the same notion as to the origin of the rule requiring two witnesses having been advanced long before his time. See Huberus, Præl. Jur. Civ. lib. 22, tit. 3, N. 2; and *suprà*, Introd. pt. 2, § 66.

sult he endeavored to stop the colt, but the defendant whipped up his mare, and, although being compelled to retire at a high rate of speed in order to escape being caught by the plaintiff or his men, the colt kept pace with the mare and close beside her through all the devious courses which she was compelled to take to escape. The plaintiff at once commenced an action against the defendant for the colt, and he produced forty witnesses, not one of whom could be impeached by the defendant, who swore positively that the plaintiff raised the colt from one of his own mares, and that they knew the colt to be his. On the other hand, the plaintiff and such of his witnesses as were present when the defendant took the colt, were compelled to admit that it followed the mare as previously stated. The defendant, in addition to this, produced twenty witnesses his neighbors, who swore that they knew the colt, and that the defendant raised it from the mare in question, and upon this evidence the case went to the jury. The plaintiff's counsel insisted that the case must turn upon the preponderance of evidence, and that his client having produced *forty* unimpeachable witnesses to swear that the colt was his, and raised from one of his mares, and the defendant having produced but *twenty* witnesses to con-

and by the ecclesiastical and some other tribunals among us. As might naturally be expected, much has been said and written, and the most opposite views have prevailed

tradict this evidence, the plaintiff was clearly entitled to their verdict. Mr. Lincoln, knowing that the jury was composed of practical, common sense men, set himself at work to convince them that the *preponderance* of proof was with his client. After having argued somewhat at length upon the instincts of horses, and the fact that the colt had followed its mother under the circumstances and in the manner detailed, he said: "Gentlemen of the jury, the plaintiff's counsel insists that this case must be decided upon the preponderance of evidence, and I admit it. He says that his client having produced forty witnesses to sustain his case, and my client having produced but twenty to sustain his, that the preponderance is with him, and if this was all there was to predicate your verdict upon, I should admit the correctness of this proposition also, but, unfortunately for the gentleman's case, the mare knew its colt and the colt knew the mare, and the testimony of the mare and colt as to their relationship, under the circumstances, is worth more than the testimony of five hundred witnesses that they were not related. Men may lie when you can't prove it, but horses and colts, guided by instinct, don't lie, and can't be mistaken. Now, gentlemen, what is a preponderance of proof in a case? It is evidence which satisfies you that one side is right and the other wrong. It is evidence so strong on the one side or the other as convinces your mind as to the right, so that if you was a-going to bet your money as to who was right in the case, you would have no hesitation upon which side to bet. Now, gentlemen, if you was a-going to bet six and a quarter cents as to who owned this colt, on which side would you bet? and the side you would bet on is entitled to your verdict." It is needless to say that the verdict was for the defendant.

As further illustrative of the force of Circumstantial Evidence, the following cases selected from those given by Mr. Wills, in his work on Circumstantial Evidence, will be found valuable:

"(1) In the autumn of 1786, a young woman, who lived with her parents in a remote district in Kirkcudbright, was one day left alone in the cottage, her parents having gone out to the harvest-field. On their return home a little after mid-day they found their daughter murdered, with her throat cut in a most shocking manner. The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. Upon opening the body the deceased appeared to have been some months gone with child; and on examining the ground around the cottage, there were discovered the footsteps of a person who had seemingly been running hastily from the cottage, by an indirect road through a quagmire or bog in which there were stepping-

on the merits of the different systems. Those who take the civil-law view contend that it is dangerous to allow a tribunal to act on the testimony of a single witness —

stones. It appeared, however, that the person in his haste and confusion had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them; and it appeared that they were those of a person who must have worn shoes the *soles* of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered also, along the track of the footsteps, and at certain intervals, drops of blood; and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody. Not the slightest suspicion at this time attached to any particular person as the murderer, nor was it even suspected who might be the father of the child of which the girl was pregnant. At the funeral a number of persons of both sexes attended, and the steward-depute thought it the fittest opportunity of endeavoring, if possible, to discover the murderer; conceiving rightly that to avoid suspicion, whoever he was, he would not on that occasion be absent. With this view, he called together after the interment the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off and measured; and one of the shoes was found to resemble, pretty nearly, the impression of the footsteps near to the cottage. The wearer of the shoe was the school-master of the parish, which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination, however, of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was round at that place. The measurement of the rest went on, and after going through nearly the whole number, one at length was discovered which corresponded exactly with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails."

"William Richardson, the young man to whom the shoe belonged, on being asked where he was the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all day employed at his master's work, a statement which his master and fellow-servants who were present confirmed. This going so far to remove suspicion, a warrant of commitment was not then granted; but some circumstances occurring a few days afterward, having a tendency to excite it anew, the young man was apprehended and lodged in jail. Upon his examination he acknowledged that he was *left-handed*; and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before. He still adhered to what he had said of his having been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided; but in the course of the inquiry it turned out that he had been

since by this means any person, even the most vile, can swear away the liberty, honor, or life of any one else; they insist on the undoubted truth, that the chance of

absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day; that he called at a smith's shop, under the pretense of wanting something, which it did not appear he had any occasion for; and that this smith's shop was in the way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said that about the time the murder was committed (and which corresponded to the time that Richardson was absent from his fellow-servants) she saw a person exactly with his dress and appearance running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence which would intercept him from view, and which was the very track where the footsteps had been traced. His fellow-servants now recollected that in the forenoon of that day they were employed with Richardson in driving their master's carts; and that when passing by a wood, which they named, he said that he must run to the smith's shop and would be back in a short time. He then left his cart under their charge; and having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been longer absent than he said he would be, to which he replied that he stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled as if he had stepped into a puddle; on which they asked where he had been. He said he had stepped into a marsh, the name of which he mentioned; on which his fellow-servants remarked, 'that he must have been either mad or drunk if he had stepped into that marsh, as there was a foot-path which went along the side of it.' It then appeared, by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them. A search was then made for the stockings he had worn that day, which were found concealed in the thatch of the apartment where he slept, and appeared to be much soiled, and to have some drops of blood on them. The last he accounted for by saying, first, that his nose had been bleeding some days before; but it being observed that he had worn other stockings on that day, he said he had assisted in bleeding a horse; but it was proved that he had not assisted, and had stood at such a distance that the blood could not have reached him. On examining the mud or sand upon the stockings, it corresponded precisely with that of the mire or puddle adjoining to the cottage, which was of a very particular kind, none other of the same kind being found in that neighborhood. The shoemaker was then discovered who had mended his shoes a short time before, and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been those he had mended. It then came out that Richardson had been acquainted with the deceased, who was considered in the county as of weak intellect, and had on

discrepancy between the statements of two false witnesses, when examined apart, is a powerful protection to the party attacked; and some of them endeavor to

one occasion been seen with her in a wood, in circumstances that led to a suspicion that he had had criminal intercourse with her; and on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly hurt. It was proved further, by the person who sat next to him when his shoes were measuring, that he trembled much, and seemed a good deal agitated; and that in the interval between that time and his being apprehended he had been advised to fly, but his answer was, 'Where can I fly to?' On the other hand, evidence was brought to show that, about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased; and it was said that some of the crew might have committed the murder, though their motives for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that any thing was missing from the cottages in the neighborhood. The prisoner was tried at Dumfries in the spring of 1787, and the jury by a great plurality of voices found him guilty. Before his execution he confessed that he was the murderer; and said it was to hide his shame that he committed the deed, knowing that the girl was with child by him. He mentioned also to the clergyman who attended him where the knife would be found with which he had perpetrated the murder; and it was found accordingly, in the place he described, under a stone in a wall, with marks of blood upon it. *Rex v. Richardson, Burnett's C. L., ut supra*, 524. This case is also concisely stated in the *Memoirs of the Life of Sir Walter Scott* (iv. 52, 2d ed.); and it supplied one of the most striking incidents in "Guy Mannering."

"The casual discovery of circumstances which indicated the existence of a powerful *motive* to commit the deed, the facts that it had been committed by a *left-handed* man, as the prisoner was, thus narrowing the range of inquiry, and that there was an interval of absence which afforded the prisoner the necessary *opportunity* of committing the crime, his false assertion that he had not been absent from his work on that day, contradicted as it was by witnesses who saw him on the way to and in the vicinity of the scene of the murder, amounting to an admission of the relevancy and weight of that circumstance if uncontradicted, the discovery of his footsteps near the spot, his agitation at the time of the admeasurement and comparison of his shoes with the impressions, the discovery of his secreted stockings spotted with blood, and soiled with mire peculiar to the vicinity of the cottage, the scratches on his face, his various contradicted statements, all these particulars combine to render this a most satisfactory case of conviction, and to exemplify the high degree of assurance which circumstantial evidence is capable of producing.

(2) "A man named Patch had been received by Mr. Isaac Blight, a ship-breaker, near Greenland Dock, into his service in the year 1803. Mr. Blight having become embarrassed in his circumstances in July, 1805, entered into a deed of

place the matter on a *jure divino* foundation, by contending that the rule requiring two witnesses is laid down in scripture.¹ Now we are by no means pre-

¹ The civilians and canonists, Mascard. de Prob. Quæst. 5, N. 10; Decretal. Gregor. IX. lib. 2, tit. 20, cap. 23, &c.; and, there is reason to believe, our old lawyers, Fortesc. cc. 31, 32; 3 Inst. 26; Plowd. 8; argument in *R. v. Vaughan*, 18 Ho. St. Tr. 535; and their contemporaries; see Waterhouse, Comm. on Fortesc. pp. 402-3, and *Sir Walter Raleigh's case*, 2 Ho. St. Tr. 15; fancied that they saw in Scripture a divine command, to require the testimony of more than one witness in all judicial proceedings. On this, Serjeant Hawkins, 2 P. C. c. 25, s. 131, very judiciously observes, that the passages in the Old Testament which speak of requiring two witnesses, "concern only the judicial part of the Jewish law which, being framed for the particular government of the Jewish nation, doth not bind us any more than the ceremonial; and that those in the New Testament contain only prudential rules for the direction of the government of the Church, in matters introduced by the Gospel, and no way control the civil constitution of countries." See also 1 Greenl. Evid. § 260 a, note (3), 7th Ed. Not only is the notion of a *jus divinum* on such matters untenable and absurd under a religion whose Founder declared that his kingdom is not of this world, John, xviii. 36, and disclaimed all authority as a judge or divider over men, Luke, xii. 14; but it may be questioned whether the passages cited in support of the dogma really bear it out, when considered in themselves apart from traditions and glosses. The text of the

composition with his creditors; and in consequence of the failure of this arrangement he made a colorable transfer of his property to the prisoner. It was afterward agreed between them, that Mr. Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two-thirds of the profits, and the prisoner the remaining third, for which he was to pay £1,250. Of this amount, £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 16th of September; the prisoner representing that he had received the purchase-money of an estate and lent it to Goom. On the 16th of September the prisoner represented to Mr. Blight's bankers that Goom could not take up the bill, and withdrew it, substituting his own draft upon Goom, to fall due on the 20th of September. On the 19th of September Mr. Blight went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford, and then went to London, and represented to the bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore they were not to present it. The prisoner boarded in Mr. Blight's house, and the only other inmate was a female servant, whom, about eight o'clock on the same evening (the 19th), he sent out to procure some oysters for his supper. During her absence a gun or pistol ball was fired through the shutter of a parlor fronting the Thames, where the family, when at home,

pared * to deny, that under a system where the decision of all questions of law and fact is in- [* 744]

Mosaic code on this subject will be found in Numb. xxxv. 30; Deut. xvii. 6, and Deut. xix. 15; the first two of which prohibit *capital* punishment unless on the testimony of at least two witnesses, and the last directs that "one witness shall not rise up against a man for any iniquity, or for any sin, that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." In the case also of pre-appointed evidence by deeds, agreements, &c., it seems to have been customary among the Jews, as among ourselves, to secure the testimony of more than one witness (see Isaiah, viii. 2; Jer. xxxii. 10-13). But nothing in the Old Testament, that we are aware of, gives the remotest intimation that two witnesses were required in *civil* cases in general; and there are some passages which seem indirectly to show the reverse. Thus when Moses speaks of civil trespasses, in Exod. xxii. 9, he says nothing about any number of witnesses: "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor." The Jews, like the rest of mankind, had their documentary evidence, their real evidence, and their presumptive evidence. In Deut. xxiv. 1, it is provided that a man may put away his wife by giving her a written bill of divorcement, but no mention is made

usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated; and a man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person. From the manner in which the ball had entered the shutter, it must have been discharged by some person who was close to the shutter; and the river was so much below the level of the house, that the ball, if it had been fired from thence, must have reached a much higher part than that which it struck. The prisoner declined the offer of the neighbors to remain in the house with him that night. On the following day he wrote to inform Mr. Blight of this transaction, stating his hope that the shot had been accidental, that he knew of no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him. Mr. Blight returned home on the 23d of September, having previously been to London to see his bankers on the subject of the £1,000 draft. Upon getting home, the draft became the subject of conversation, and Mr. Blight desired the prisoner to go to London and not to return without the money. Upon his return from London, the prisoner and Mr. Blight spent the evening in the *back* parlor, a different one from that in which the family usually sat. About eight o'clock the prisoner went from the parlor into the kitchen, and asked the servant for a candle, complaining that he was disordered. The prisoner's way from the

[* 745] trusted to a single * judge, or in a country where the standard of truth among the population is

of witnesses to that instrument. So of real evidence in Exod. xxii, 10-13, it is expressly provided, "if a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast to keep, &c. And if it be stolen from him, he shall make restitution unto the owner thereof. If it be torn in pieces, then let him bring it for witness, and he shall not make good that which was torn." We also read in another place, "Now this was the manner in former time in Israel concerning redeeming and concerning changing, for to confirm all things: A man plucked off his shoe, and gives it to his neighbor; and this was a testimony in Israel." Ruth, iv. 7. And, lastly, with respect to presumptive evidence, there is one celebrated case in Jewish history which appears to have been decided without any witness at all. We allude to the judgment of Solomon, 1 Kings, iii. 16 *et seq.* Two women with child were delivered in a house, in which the narrative expressly states there was no one but themselves at the time. One of the children died; and both women claimed the living child, one accusing the other of having taken it from her as she slept, and put the dead child in its place. Solomon, as is well known, ascertained the truth by ordering the living child to be divided into two parts, and a part delivered to each of the women, to which the pretended mother assented; but the real mother, actuated by her maternal feelings, prayed that, sooner than the child should be slain, he might be given to her adversary.

kitchen was through an outer door which fastened by a spring lock, and across a paved court in front of the house, which was inclosed by palisadoes, and through a gate over a wharf, in front of that court, on which there was the kind of soil peculiar to premises for breaking up ships, and then through a counting-house. All of these doors, as well as the door of the parlor, the prisoner left open, notwithstanding the state of alarm excited by the shot. The servant heard the privy-door slam, and almost at the same moment saw the flash of a pistol at the door of the parlor where the deceased was sitting, upon which she ran and shut the outer door and gate. The prisoner immediately afterward rapped loudly at the door for admittance, with his clothes in disorder. He evinced great apparent concern for Mr. Blight, who was mortally wounded and died on the following day. From the state of the tide, and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them. In consequence of this event Mrs. Blight returned home, and the prisoner, in answer to an inquiry about the draft which had made her husband so uneasy, told her that it was paid, and claimed the whole of the property as his own. Suspicion soon fixed upon the prisoner, and in his sleeping-room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy. The prisoner usually wore boots, but on the evening of the murder he wore shoes and stockings. It was supposed

very low, such a rule may be a *valuable security against the abuse of power and the [* 746] risk of perjury; but it is far otherwise where a high

We may here observe, that if the civilians and canonists considered the law of Moses obligatory on them in matters of *procedure*, there was a portion of it which they might have copied with advantage. By that law, every Jew, at least when his life or person was in jeopardy, was tried in the face of his countrymen at the gate of his city, and most usually by several of his elders. See Deut. xxi. 19, &c.; xxii. 15; xxv. 7; Ruth, iv. 1-11; Josh. xx. 4; Jer. xxvi. 10, &c.; Amos, v. 10-15, &c. The civilians and canonists intrusted the decision of every cause, to the judgment of a single judge, sitting in secret, acting on evidence taken in secret, and reduced to writing by a subordinate officer, with scarcely a check against misdecision, beyond a tedious and expensive appeal to a superior tribunal, similarly constituted.

The passages in the New Testament which were cited, or more properly speaking tortured, to bear out the dogma requiring a plurality of witnesses *in all cases*, are Matt. xviii. 15, 16; John, viii. 17; 2 Cor. xiii. 1; 1 Tim. v. 19; Heb. x. 28; but principally the first, respecting which the text of the Decretal runs thus: "Quia non est licitum alicui Christiano, et multò minùs crucis Christi inimico, ut causæ suæ unius tantùm quasi legitimo testimonio finem imponat: Mandamus, quatenus si inter vos et quoscunque Judæos emerit quæstio, in qualibet causâ Christiani, et maxime clerici, non minus, quàm duorum vel trium *virorum*, qui sint probatæ vitæ et fidelis conversationis, testi-

that, to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes, and afterward gone on the wharf to throw away the pistol into the river. All the prisoner's statements as to his pecuniary transactions with Goom, and his right to draw upon him, and the payment of the bill, turned out to be false. He attempted to tamper with the servant girl as to her evidence before the coroner, and urged her to keep to one account; and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased, and equivocated much as to whether he wore boots or shoes on the evening of the murder, as well as to his ownership of the soiled stockings, which, however, were clearly proved to be his, and for the soiled state of which he made no attempt to account. The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had been on ill terms; but they had no motive for doing him any injury, and it was clearly proved that upon both occasions of attack they were at a distance.

"The prisoner's motive was to possess himself of the business and property of his benefactor; and to all appearance his falsehoods and duplicity were on the point of being discovered. His apparent incaution on the evening of the murder could be accounted for after the preceding alarm by no other supposition than that it was the result of premeditation, and intended to afford facili-

[* 747] *standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add to this, that the anomaly of acting on the testimony

monium admittatis, juxta illud Dominicum, *In ore duorum vel trium testium stat omne verbum*. Quia licet quædam sint causæ, quæ plures, quàm duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminatur." Decretal. Gregor. IX. lib. 2, tit. 20, c. 23. See also c. 4. The passage on which so much stress is here laid is thus given in the Church of England version of the New Testament, which agrees in substance with the Vulgate, "If thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Matt. xviii. 15, 16. Now, besides the answer already given from Serjt. Hawkins, it might be sufficient to observe on this passage, that the case put in it is clearly a case of *pre-appointed* evidence, the marked difference between which and *casual* evidence has been pointed out, *suprà*, Intro. pt. 1, § 31, and pt. 2, § 60; so that, even supposing the command to affect municipal law at all, the applying it to every case, civil or criminal, is an unwarrantable extension of the text. But there is another answer, more complete and satisfactory, because applicable to most of the other passages as well as to this. Assuming that the passage, "in the mouth of two or three witnesses every word may be established," is to be understood as recognizing the binding authority of the Mosaic

ties for the execution of his dark purposes. The direction of the first ball through the shutter excluded the possibility that it had been fired from any other place than the deceased's own premises; and by a singular concurrence of circumstances, it was clearly proved that no person escaped from the premises after either of the shots, so that suspicion was necessarily restricted to the persons on the premises. The occurrence of the first attack during the temporary absence of the servant (that absence contrived by the prisoner himself), the discovery of a ramrod in the very place where the prisoner had been, and of his soiled stockings folded up so as to evade observation, his interference with one of the witnesses, his falsehoods respecting his pecuniary transactions with Goom and with the deceased, and his attempts to exonerate himself from suspicion by implicating other persons, all these cogent circumstances of presumption tended to show not only that the prisoner was the only person who had any motive to destroy the deceased, but that the crime could have been committed by no other person; and while all the facts were naturally explicable upon the hypothesis of his guilt, they were incapable of any other reasonable solution. The prisoner was convicted and executed. Surrey Spring Ass. 1806, *coram* L. C. B. Macdonald. Gurney's Short-hand Report.

(8) "A respectable farmer, who had been at Stourbridge market on the 18th of December, left that place on foot a little after four in the afternoon, to return

of one person is more apparent than real ; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its

law with respect to witnesses ; the principle of that law, as already shown, was to require more than a single witness in those cases only where condemnation would be followed by very serious punishment ; and it appears from the following verse of the chapter under consideration, that disobedience to the remonstrance there directed to be made, would be the foundation of further proceedings, ending in the total excommunication of the offending party. The next three passages may be explained in a similar way ; as they all relate to matters where the gravest consequences would follow disobedience, after certain acts had been evidenced in the manner therein stated. In John, viii. 17, 18, our Lord shows the Jews that there are two witnesses to the divinity of his mission ; in the 2 Cor. xiii. 1, the Apostle Paul, in order to justify himself in taking severe measures against some of the Corinthians for disobedience of his injunctions (see ver. 2 and 10), tells them that he was in a condition to prove every word of them by two or three witnesses ; and in the third (1 Tim. v. 19) the same apostle lays down as a rule of ecclesiastical peace, that an accusation should not be received *against an elder* but before two or three witnesses. The remaining passage (Heb. x. 28) is little more than a historical allusion to the Mosaic law on this subject ; and, so far as it goes, rather confirms the views put forward in this note, viz., he that despised Moses' law died without mercy under two or three witnesses."

home, a distance of between two and three miles. About half a mile from his own house he was overtaken by a man, who inquired the road for Kidderminster, and they walked together for two or three hundred yards, when the stranger drew behind and shot him in the back, and then robbed him of about eleven pounds in money and a silver watch. After lingering ten days, he died of the wound thus received. The wounded man noticed that the pistol was long and very bright, and that the robber had on a dark-colored great-coat, which reached down to the calves of his legs. Several circumstances of correspondence with the description given by the deceased, conspired to fix suspicion upon the prisoner, who for about fourteen months had worked as a carpenter at Ombersley, seventeen miles from Stourbridge. It was discovered that he had been absent from that place from the 17th to the 22d of December ; that on the 23d he had taken two boxes, one containing his working-tools and the other his clothes, to Worcester, and there delivered them to a carrier, addressed to John Wood, at an inn in London, to be left till called for, the name by which he was known being William Howe ; and that on the 25th he finally left Ombersley, and went to London. Upon inquiry at the inn to which the boxes were directed, it was found that a person answering the description of the prisoner had removed them in a meal-man's cart to the Bull in Bishopsgate street, and that on the 5th of January they had been removed from thence

intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests even on these circumstances alone; they are usually

Before dismissing this subject, we would direct the attention of our readers to the word "*virorum*," in the above Decretal; which was evidently inserted to exclude the testimony of *women*, whose evidence was so much suspected by the civilians: *vide suprâ*, Introd. pt. 2, § 64. It is perhaps needless to add, that none of the passages of Scripture which have been referred to, make any such distinction. Indeed in John, viii. 17, already cited, the expression is "*ἀνδρῶπων*," not "*ἀνδρῶν*." The notion may have had its origin in an apparently spurious law attributed to Moses by Josephus: *Antiq. Judiac. lib. 4, c. 8, N. 15*, for which see Introd. part 2, § 64.

in a cooper's cart. Here all trace of the boxes seemed cut off; but on the 12th of January the police officer succeeded in tracing them to a widow woman's house, in a court in the same street; when, upon examining the box which contained the prisoner's clothes, they found a screw-barrel pistol, a pistol-key, a bullet-mould, a single bullet, a small quantity of gunpowder in a cartridge, and a fawn-skin waistcoat; which latter circumstance was important, as the prisoner was seen in Stourbridge on the day of the murder, dressed in a waistcoat of that kind. By remaining concealed in the woman's house the police were enabled to apprehend the prisoner, who called there the following night. Upon his apprehension, he denied that he had ever been at Stourbridge, or heard of the deceased being shot; and he accounted for changing his name at Worcester, by stating that he had a difference with his fellow work-people, and afterward that he did it to prevent his wife, whom he had determined to leave, from being able to follow him. On being asked where he was on the 18th of December, he said he believed at Kidderminster, a town about six miles from Stourbridge. Upon the prisoner's subsequent examination before the magistrates, he stated that he was at Kidderminster on the 17th of December, and at Stourbridge on the 18th (the day of the murder), but that he was not out of the latter town from the time of his arrival there, at one o'clock in the afternoon, until half-past seven the following morning; that in the afternoon he went to look about the town for lodgings, and ultimately went to his lodgings about six o'clock in the evening. The account which the prisoner thus gave of himself was proved to be a tissue of falsehoods. He had been seen by several witnesses between four and five in the afternoon of the day in question, on the road leading from Stourbridge toward, and not far from, the spot where the deceased was shot, and about half-past five he was seen going in great haste in the opposite direction, toward Stourbridge. He afterward called at two public houses at Stourbridge, at the first of them about six o'clock, and at the other about nine the same evening; at both of which the attack and robbery were the subjects of conversation, in which the prisoner joined; and he was distinctly spoken to as having worn a fawn-skin waistcoat. On the 21st of De-

corroborated by the presumption arising from the absence of counter-proof or explanation, and in criminal cases by the demeanor of the accused while on his trial; for the

cember the prisoner sold a watch of which the deceased had been robbed, at Warwick, stating it to be a family watch. But the most conclusive circumstance was, that a letter was sent by the prisoner, while in jail, to his wife, who, being herself unable to read, had got a neighbor to read it to her; which contained a direction to remove some things concealed in a rick near Stourbridge; where, upon search being made, were discovered a glove, containing three bullets, and a screw-barrel pistol, the fellow to that found in the prisoner's box. A gun-maker deposed that the bullet extracted from the wound had been discharged from a screw-barrel pistol, such as that produced, and that that bullet and the bullet found in the prisoner's box had been cast in the same mould.

"The prisoner's denial, on his apprehension, that he had ever been at Stourbridge, or heard of the act, though he had been seen near the spot about the time when the shot was fired, denoted a consciousness of the fatal effect of any evidence tending to establish the fact of his presence there. The discovery of a fawn-skin waistcoat in his possession, corresponding with that worn by him when seen at Stourbridge on the evening of the murder, his possession and disposal of the deceased's watch within three days after he had delivered it to his murderer, his false statement that it was a family watch, the correspondence between the weapon found in the rick and that found in the prisoner's box, and between the bullet extracted from the wound and that found in the same box, and the peculiarity that the deceased had been killed by a wound from a screw-barreled pistol, all these circumstances placed the guilt of the prisoner beyond any reasonable doubt, and there was no possibility of referring them to casual and accidental coincidence, or of explaining them upon any hypothesis compatible with his innocence. He was convicted, and before his execution confessed his guilt. Stafford Spring Ass. 1813, *coram* Mr. Justice Bayley.

"(4) Three men, named Smith, Varnham, and Timms, were tried before Mr. Justice Coltman, at the Norfolk Spring Assizes, 1837, for the murder of Hannah Mansfield, on Tuesday the third of January preceding. The deceased, who was about forty years of age, lived alone in a cottage at Denver, on the border of a common, at a distance from the turnpike-road leading from Hilgay through Denver to Downham, and remote from any other house, except an adjoining cottage under the same roof, occupied by a laborer and his family. The deceased had acquired some repute as a fortune-teller, for which purpose she kept by her some money, which she called her bright money; and she possessed a quantity of plate, consisting of cream-jugs, table and teaspoons, sugar-tongs, salt-cellars, and a silver tankard, which she kept in a corner cupboard and had frequently boastfully displayed. She spent the evening preceding the murder at her neighbor's house, which she left about half-past

observation of Beccaria must not be forgotten, "imperfect proofs, from which the accused might clear himself, and does not, become perfect."¹ Still, however, on the trial

¹ Beccaria, *Dei Delitti et delle Pene*, s. 7. See, also, per Abbott. C. J., in *R. v. Burdett*, 4 B. & A. 161-2.

eleven; her neighbor's wife being engaged in washing did not go to bed till one o'clock, when she disturbed her husband, who, as he lay awake about two o'clock, heard a noise in the deceased's cottage, but hearing nothing further went to sleep again. About ten o'clock the following morning the poor woman was found dead in her cottage with her throat cut from ear to ear; the cottage door had been split open by some violent effort, and the cottage had been robbed of her money and treasure. The footsteps of two men were traced from the turnpike-road toward the deceased's house, and from the house into the stack-yard, and back again to the foot-yard, and across the common to a run of water, and thence to the turnpike-road: one of the footsteps was very large, and peculiarly shaped and nailed, there being four nailmarks in the center of the heel, in a line from back to front, and two on each side; and there were nailmarks also in the waist of the heel, between the sole and the heel, and the sole was very full of nailmarks. The prisoner Timms' shoes exactly corresponded with these marks; the other footstep was a similar one and full of such marks. The large footmark proceeding from the house had marks of blood, and the smaller footstep was on the other side of the path, and the center of the path was so hard and beaten that a third person might have walked on it without leaving any impression. Only the larger footstep was traced to the stack-yard, but both footsteps were traced in a direction toward and from the house. There was also the footstep of a third person, who appeared to have been stationed for the purpose of watching the back door of the adjoining cottage. The three prisoners had worked in the neighborhood as excavators, a few months before the murder; and about twelve months previously the prisoner Smith, in company with two other men, had called at the adjoining cottage, and asked if Hannah Mansfield was at home, supposing that to be her cottage, stating that he had lost some tools, about which he had wished to consult her. They had been loitering at various low public houses in the neighborhood of the deceased's cottage for several days preceding the murder, and left one of those public houses, about two miles from her residence, where they had spent the evening, about eleven o'clock on the night of the murder. Three men, corresponding in appearance with the prisoners, one of whom was identified as the prisoner Timms, were met on the following morning about three o'clock a mile from the deceased's house, walking very fast along the road from Denver to Downham; and about half-past eight the same morning the same three men were seen at Leverington, fourteen miles from Denver, apparently fatigued, and the pocket of one of them was stuffed with something bulky. At Sutton St. Edmond's, about twenty miles from Denver, the prisoners

of certain accusations peculiarly liable to be made the instruments of persecution, oppression or fraud; and in certain cases of pre-appointed evidence (where parties

stopped at a public house to refresh themselves, and one of them paid away a very bright and unworn sixpence and shilling, of the year 1817. After having staid some hours they proceeded to Whapolde Drove, where they remained at a public house for several days, and fell into company with a shoemaker who made two pairs of boots for Varnham and Smith, for which Timms paid in a half-sovereign, a half-guinea, and a sixpence. Varnham cut the tops from his old boots, and the landlord's wife burned the soles and threw the clates upon an ash-heap, where they were afterward found by a police-officer, and exactly fitted one of the impressions made in the snow near the cottage. While sitting by the fireside one evening at this public house the prisoner Smith laid hold of the bottom of his pocket, which seemed heavy, and a bundle contained in a silk handkerchief dropped out, from which some teaspoons, a pair of sugar-tongs, and some glass fell on the floor; the glass was broken, the other things he hastily collected and replaced. On the following day the prisoner Timms called upon the shoemaker, who had been present on the previous evening professedly to talk about the boots which he had to make, and took occasion to remark that 'he need not say any thing about what he had seen, as it might get the landlord into a scrape, though for themselves they did not care about it, as they had got the things from Lisbon.' On the Saturday following the prisoners were traced to Whittlesea, where they offered for sale to a gunmaker a mass of molten silver, upward of two pounds weight, which the prisoner Timms said had consisted of spoons, salt-cellar, and elegant things fit for any table, a description corresponding with the deceased's plate; and they offered to purchase a pair of pistols. The silver was cut by the person to whom it was offered into six or seven pieces, and offered by him for sale to another person; but not having succeeded in disposing of it, they gave his wife in return for his trouble a small strip of it weighing about an ounce, and three keys, which were afterward identified as having belonged to the deceased. The prisoners were then traced to and apprehended in Doncaster. To the officers they gave false accounts of themselves. Stains of blood were found upon some parts of the clothes of all the prisoners, and the clothes of two of them appeared to have been washed in order to remove stains. On the person of Smith were found several pounds in money, a picklock key, lucifer matches, and a knife on which was some congealed blood; and on the person of Timms was found, wrapped up in a piece of linen, a mass or wedge of molten silver. With several of their fellow-prisoners Smith and Varnham conversed upon the subject of this cruel action in language of disgusting coarseness and brutality; which implied guilty knowledge of and participation in the crime, since they expressed confidence of security if their companions remained silent, as nobody had seen them go to the house.

"The knowledge which the prisoners possessed of the locality of the de-

about to do a deliberate act may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act); the

ceased's cottage, and of her character and circumstances, their presence in the vicinity at so suspicious an hour, in the inclement season of mid-winter, so close upon the time when the deceased was murdered, their subsequent wanderings, apparently without any object, their profuse expenditure of money, their apparently wanton destruction of valuable articles of apparel, unaccountable except on the supposition that they were the pregnant evidences of guilt, their possession of so much money and molten silver when apprehended, the correspondence of the shoe-marks about the cottage with the shoes of two of the prisoners, and the possession of the deceased's keys, the concurrence of these otherwise inexplicable facts could not be rationally accounted for except by the conclusion of the guilt of the prisoners, who made a full confession, and two of whom, Smith and Timms, were executed. *Rex v. Smith, Varnham, and Timms.*

"A foreigner, named Courvoisier, was tried at the Central Criminal Court (June, 1840) for the murder of Lord William Russell, an elderly gentleman, seventy-five years of age, a widower, who lived in Norfolk street, Park Lane. The deceased's family consisted of the prisoner, who had been in his service as valet about five weeks, and of a housemaid and cook, who had lived with him three years, beside a coachman and a groom who did not live in the house. On the 6th of May the female servants went to bed as usual, and the housemaid on going to bed lighted a fire and set a rush-light in her master's bedroom, which presented its usual appearance; the prisoner remained sitting up to warm his bed. The housemaid rose about half-past six on the following morning, and on going down stairs knocked, as usual, at the prisoner's door. At her master's door she noticed the warming-pan, which was usually taken down stairs; on going into a back drawing-room she found the drawers of her master's desk open, his bunch of keys lying on the carpet, and a screw-driver lay on a chair. In the hall his lordship's cloak was found neatly folded up, together with a bundle, containing a variety of valuable articles, most of them portable, such as a thief would ordinarily put in his pocket instead of deliberately packing up. In the dining-room she found several articles of plate scattered about. The street-door, though shut, was unfastened, but the testimony of the police, who passed the house many times in the night, rendered it very unlikely that any person had left it in that direction. Alarmed by these appearances, the housemaid called the prisoner, and found him dressed, though only a few moments had elapsed since she had knocked at his door, which was a much shorter time than he usually took to dress. They went together down stairs; and after examining the state of the dining-room and the prisoner's pantry, where the cupboard and drawers were all found opened they proceeded to their master's bed-room, where he was found with his throat cut, in a manner which must have produced instant death. His lordship

law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness.¹

¹ See *infra*.

usually placed his watch and rings on his dressing-table; but they had been taken away, and his note-cases, in one of which the prisoner stated that he had seen a £10 and a £5 note a few days before, were open and emptied of their contents. A book was found on the floor, and his lordship's spectacles lay upon it, and there was a candlestick about four or five feet from the bed, with a candle burned to the socket. These articles appeared to have been so placed, to create the impression that his lordship had been murdered while reading; but he was not accustomed to read in bed, and only so much of the rush-light was burned as would have been consumed in about an hour and a half, though the candle was completely burned away. The prisoner stated that he left his master reading. Upon the door of the prisoner's pantry, leading to a back area, were marks as if it had been broken into, and the prisoner suggested that the thieves had entered by that door; but they appeared to have been made from within, and none of them had been made by the application of sufficient force to break open the door; the bolts appeared not to have been shot at the time, and the socket of one of them had been wrenched off when the door was open. The marks on this door appeared to have been made with a bent poker found in the pantry. It was clear that no person had entered the premises from the rear, since in one direction they could have been approached only by passing over a wall covered with dust, which would have retained the slightest impression; and on the other, the party must have passed over some tiling which was so old and perished as necessarily to have been damaged by the passing of any person over it; while from the testimony of the police it was equally clear that no person had escaped through the front door. For several days the missing articles could not be found, and the case appeared to be wrapped in impenetrable mystery; but at length, upon a stricter search, his lordship's rings and Waterloo medal, five sovereigns, and a £10 note, the latter of which had been removed from his note-case, were found concealed behind the skirting-board in the prisoner's pantry; and beneath the leaden covering of a sink was found his lordship's watch, and several other articles were also found in other parts of the same room. But a quantity of plate which had been stolen still remained undiscovered, notwithstanding the most diligent efforts to discover it; and its non-production was the only circumstance which gave any apparent countenance to the possibility that the house had been robbed on the night of the murder, by parties who had escaped. The mystery was cleared up, however, in a very extraordinary manner, during the progress of the trial. About a fortnight before the murder, the prisoner had left a parcel in the care of a hotel-keeper with whom he had formerly lived as waiter, whose curiosity was excited to examine its contents by reading in a newspaper a suggestion that, as the prisoner was a foreigner, he had probably left the plate at one of the foreign hotels in London. The parcel was found

§ 598. On the other hand, however, as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a *casual* nature; above all, where, being in violation of law, as much clandestinity as possible would
 [* 748] *be observed, it ought not to be required without strong and just reason. Its evils are these: 1. It offers a premium to crime and dishonesty — by telling the murderer and felon that they may exercise their trade, and the knave that he may practice his fraud, with impunity, in the presence of any one person; and the unprincipled man that he may safely violate any engagement, however solemn, contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them. 3. They produce a mischievous effect on the tribunal, by their natural tendency to re-act on the human mind; and they thus create a system of mechanical decision, dependent on the number of proofs, and regardless of their weight.¹

¹ Introd. pt. 2, § 69.

to contain the missing plate. The prisoner had been known in this situation only by his Christian name, which circumstance accounted for the fact that suspicion had not been sooner excited by the account of the murder and robbery which had appeared in the daily journals. This discovery, in conjunction with the simulated appearances of external violence and robbery, and the conclusive evidence that the premises had not been entered from without, made it certain that the robbery of the plate and the murder had been committed by one of the inmates; while the manner and place of concealment, and the artless and satisfactory account given by the female servants, rendered it equally clear that the prisoner, and he alone, could have been the perpetrator of this cruel action. He made a confession of his guilt, and was executed pursuant to his sentence. Sessions Papers, 1840; 2 Townsend's St. Tr. 244.

"It is scarcely possible, in the absence of unimpeachable direct evidence, to conceive of any grounds of moral assurance and judgment more satisfactory and conclusive than those afforded by such combinations of facts as were presented in the foregoing cases."

Origin of the rule.

§ 599. But whether the common-law rule had its origin in these considerations is doubtful. Our old lawyers do not seem to have been emancipated from the civil and canon-law notion, that two witnesses ought to be required in all cases, based as this notion was then supposed to be, on the authority of Scripture, and fortified by the practice of the Church.¹ But as in those times the jury were themselves a species of witnesses, and might, if they chose to run the risk of an attainr, find a verdict without any evidence being produced before them,² our ancestors considered that a judgment founded on the verdict of twelve men was a virtual compliance with, what they deemed, a divine command. One strong proof of this is, that where the trial was without a jury, namely, on a trial by witnesses, the rule of the civil and canon law was thought binding, and two witnesses were exacted.³

Exceptions justifiable in certain cases.

§ 600. Some modern jurists, not satisfied with condemning * the civil law for requiring at least two witnesses in all cases, attack ours for not [* 749] going far enough in the opposite direction, and would abolish the exceptions to the rule which declares the testimony of one to be sufficient. At the head of these stands Bentham,⁴ (a) whose arguments have been consid-

¹ *Suprà*, § 597, p. 1076, note 1.

² Bk. 1, pt. 2, § 119.

³ *Infra*.

⁴ 4 Benth. Jud. Ev. 503; 5 Id. 463 *et seq.*

(a) One witness is not sufficient to convict for perjury unless his evidence is corroborated by extrinsic evidence. *Merritt's case*, 4 City Hall Rec. (N. Y.) 58; *Woodcock v. Keller*, 6 Cow. (N. Y.) 118; *People v. Burden*, 9 Barb. (N. Y.) 467

ered in the Introduction ;¹ but who, after all, admits, what indeed it would be difficult to deny, that requiring the second witness is, to a certain extent at least, a protection against perjury.²

§ 601. On the whole, we trust our readers will agree with us in thinking, that any attempt to lay down a *universal* rule on this subject, which shall be applicable to all countries, ages, and causes, is ridiculous; and that, although so far as this country is concerned, the general rule of the common law,—that judicial decisions should proceed on the intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence,—is a just one;³ there are cases where, from motives of public policy, it has been wisely ordained otherwise.

Exceptions to the general rule.

§ 602. Of the exceptions to the general rule respecting the sufficiency of one witness, some exist by the common law, but by far the greater number have been introduced by statute.

Exceptions at common law—Prosecutions for perjury.

§ 603. Exceptions at common law. 1. The most remarkable and important of these is in the case of prosecutions for perjury.⁴ We speak of this as an

¹ Pt. 2, § 53.

² 5 Benth. Jud. Ev. 468.

³ An eminent French jurist of our day calls it “*vérité de sens commun, qu'il faut peser les témoignages et non les compter.*” Bonnier, *Traité des Preuves*, § 198.

⁴ 4 Blackst. Com. 358; 2 Ev. Poth. 280; 2 Stark. Ev. 859, 3rd Ed.; *R. v. Muscot*, 10 Mod. 192; *Fanshaw's case*, Skinn. 327; *R. v. Broughton*, 2 Str. 1229, 1230.

[* 750] * exception established by common law, because it is generally so considered, and certainly does not appear to have been introduced by statute. But whether our law has always required the testimony of two witnesses to be given *to the judge and jury* on a charge of perjury, may be questioned, as most of our early text writers are silent on the subject. Fortescue,¹ indeed,² says, “Qui testes de perjurio convincere satagit, multò illis plures producere necesse habet,” a passage transcribed without comment by Sir Edward Coke,³ but the context of which renders it doubtful whether, when the Chancellor wrote these words, he meant to express a legal rule. A stronger argument may be derived from the well-known practice in attain, that a jury of twelve men could only be attainted of false verdict by a jury of twenty-four. But, on the other hand, we must recollect that in early times the jury themselves were looked on as witnesses,⁴ who might convict of perjury, or, indeed, of any offense, on their own knowledge without other testimony. *R. v. Muscot* is the leading case on this subject.⁵ That was an indictment for perjury; and Parker, C. J., in summing up, said,⁶ “There is this difference between a prosecution for perjury, and a bare contest about property, that in the latter case the matter stands indifferent; and therefore, a credible and probable witness shall turn the scale in favor of either party; but in the former, presumption is ever to be made in favor of innocence; and the oath of the

¹ See 2 Hawk. P. C. c. 46, s. 2, and c. 25, s. 131 *et seq.*, &c.

² Fortesc. de Laud. c. 32.

³ 3 Inst. 163.

⁴ *Suprà*, bk. 1, pt. 2, § 119.

⁵ 10 Mod. 192, Mich. 12 Ann.

⁶ P. 194.

party will have a regard paid to it, until disproved. Therefore to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath [* 751] *against oath." Now the book called "The Modern Reports" is not of very high authority; but, even supposing the utmost accuracy in the above report, there is nothing in Chief Justice Parker's charge inconsistent with the supposition, that the above observations were made in the way of prudential advice and direction to the jury, and not with the view of laying down an imperative rule of law; and this supposition is in some degree confirmed by the comparison with which he sets out, between the proof in perjury and that in civil cases.

§ 604. The rule requiring two witnesses in indictments for perjury applies only to the proof of the falsity of the matter sworn to by the defendant; — all preliminary or collateral matters; such as the jurisdiction and sitting of the court, the fact of the defendant having taken the oath, together with the evidence he gave, &c., may be proved in the usual way.¹

Reason usually assigned for this exception.

§ 605. The reason usually assigned in our books for requiring two witnesses in perjury, — viz., that the evidence of the accused having been given on oath, when nothing beyond the testimony of a single witness is produced to falsify it, there is nothing but oath against

¹ Tayl. Ev. § 880, 4th Ed.; 2 Gr. Russ. 654.

oath,¹—is by no means satisfactory. All oaths are not of equal value; for the credibility of the statement of a witness depends quite as much on his deportment when giving it, and the probability of his story, as on the fact of it being deposed to on oath; and, as is justly remarked by Sir W. D. Evans, the motives for falsehood in the original testimony or deposition may be much stronger with reference to the event on the one side, than the motives for a false accusation of perjury *on the other.* In many cases, even of the most serious kind, tribunals are compelled to [*752] decide on the relative credit of witnesses who swear in direct contradiction to each other. Where, for instance, a murder or larceny is proven by one or more witnesses, and an alibi, or other defense wholly irreconcilable with their evidence, and inconsistent with any hypothesis of mistake, is proved by a like number produced by the accused, the verdict of the jury may, virtually, though not formally, determine that one set of witnesses or the other has committed perjury.

True reason.

§ 606. The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offense of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar

¹ 4 Blackst. Com. 358; Peake's Ev. 9, 5th Ed.; 3 Stark. Ev. 859, 3rd Ed.; 3 Gr. Russ. 77, 78, 4th Ed.; *R. v. Harris*, 5 B. & A. 939, note.

² 2 Ev. Poth. 280.

nature of this offense, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells,—who are frequently the basest and most unprincipled of mankind, and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them, we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure; and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission,—such as publicity, cross-examination, the aid of a jury, etc.;—and on the infliction of a severe, though not excessive, *punishment, wherever the commission of
 [* 753] the crime has been clearly proved.¹ But, in order to carry out the great objects above mentioned, our

¹ We have not overlooked the vexata quæstio, whether the taking away life by false testimony is punishable capitally by English law; on which subject see *Fost. Cr. Law*, 131, 132; 19 *Ho. St. Tr.* 810, note; 4 *Blackst. Comm.* 138 and 139; and 196, with note (4) of Professor Christian. Supposing the affirmative, it could only be by an indictment, not for perjury, but for murder, with, previous to the 14 & 15 Vict. c. 100, s. 4, the false oath laid as the means of death; for it is clear that no capital indictment could be framed, for bearing false witness with intent to murder, where no conviction of the innocent party ensued. And, as in all cases of homicide the death of the deceased must be clearly and unequivocally traced to the act of the accused, no such indictment for murder could be sustained if any other evidence, certainly if any other material evidence, besides that of the accused, were given on the former trial; for it would be impossible to measure the effect of his testimony on the mind of the tribunal. Indeed in most, if not in all such unhappy cases, more or less blame rests with the tribunal, in rashly giving credit to the false evidence; and of this opinion are said to have been the old Gothic law-givers, who, under such circumstances, punished both the witness and the judge, and, to make all sure, the prosecutor. See 4 *Blackst. Comm.* 196.

law gives witnesses the privilege of refusing to answer questions which tend to criminate, or to expose them to penalty or forfeiture ;¹ it allows no action against a witness for giving false evidence ;² and it throws every fence round a person accused of perjury. Besides, great precision is required in the indictment ; the strictest proof is exacted of what the accused swore ; and, lastly, the testimony of at least two witnesses must be forthcoming to prove its falsity. The result accordingly is that in England little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice ; and although many persons may escape the punishment awarded by law to perjury, instances of erroneous convictions for it are unknown, and the threat of an indictment *for perjury is treated by honest and upright witnesses as a brutum fulmen. [* 754]

§ 607. This view of the policy of our law is supported by the history of legislation on the subject of perjury. The law of the Twelve Tables at Rome, recognizing the impossibility of dealing with this offense according to its guilt in foro cœli, laid down, “Perjurii pœna divina, exitium ; humana, dedecus ;”³ and according to the Digest, “Qui falso vel varie testimonia dixerunt, vel utrique parti prodiderunt, à judicibus competenter puniuntur.”⁴ The legislators of the middle ages, at least in this country, took, as might be expected, the higher and more violent view of the matter ; the punishment of perjury being anciently death, afterward banishment,

¹ Bk. 2, pt. 1, ch. 1.

² *Henderson v. Broomhead*, 4 H. & N. 569 ; *Revis v. Smith*, 18 C. B. 126 ; *Coltins v. Cave*, 4 H. & N. 235 ; affirm. on error, 6 Id. 181.

³ 4 Blackst. Com. 139.

⁴ Dig. lib. 22, tit. 5, l. 16.

or cutting out the tongue, then forfeiture of goods.¹ But experience probably showed the folly and danger of such penalties for this offense, as its punishment was in time reduced to what is now the punishment for perjury at common law, viz., fine and imprisonment;² to which, until the 6 & 7 Vict. c. 85, was added the disability to bear testimony in any legal proceeding; and, lest this should be thought too light, Sir Edward Coke observes: “*Testis falsus non erit impunitus.*” *Nocte dieque suum gestat sub pectore testem;*³ his conscience always gnawing and vexing him.” The spirit of modern legislation is in accordance. The 5 Eliz. c. 9, inflicted fine, imprisonment, and the pillory (the latter of which was abolished by 7 Will. 4 & 1 Vict. c. 23); and the 2 Geo. 2, c. 25, s. 2, allowed a limited period of transportation; for which penal servitude for a term of years has been substituted by more recent enactments. And this is now the severest punishment * that can be inflicted for perjury. The [* 755] power of summarily committing false witnesses to take their trial for perjury is vested in tribunals by some modern statutes, especially the 14 & 15 Vict. c. 100, s. 19, although a similar power existed by the common law.⁴ This is all the change that has been made in the punishment of perjury for several centuries, during which death was so frequently inflicted, both by common and statute law, for many offenses falling infinitely short of it in religious and moral enormity.

¹ 3 Inst. 163; 4 Blackst. Com. 138.

² Id.

³ 4 Inst. 279.

⁴ Prov. xix. 5.

⁵ Juvenal, Sat. 13, v. 198.

⁶ *Hudson's case*, Skinn. 79.

Amount of evidence required from each witness, or proof.

§ 608. It is not easy to define the precise amount of evidence required from each of the witnesses, or proofs, in such cases. Indeed, as has been well observed by a very learned judge,¹ any attempt to do so would be illusory. Mr. Starkie, in his *Treatise on Evidence*,² informs us that *he heard* it once held by Lord Tenterden, that the contradiction of the evidence given by the accused must be given by *two direct witnesses*; and that the negative, supported by one direct witness and by circumstantial evidence, would not be sufficient: and allusion to a ruling of that sort was made by Coleridge, J., in a case before him.³ But this decision, if it ever took place, is most certainly not law. It is a startling thing to proclaim that if a man can eloin all direct, he may defy all circumstantial, evidence, and commit perjury with impunity; and we accordingly find a contrary doctrine laid down in a variety of cases.⁴ Again, some modern authorities express themselves as though it would be sufficient, if one witness were to negative directly the matter sworn to by the defendant; and some material circumstances were proved by another * witness in *confirmation* or *corroboration* of his testimony.⁵ So that, according to this view, it [* 756] would only be necessary to corroborate the testimony of the direct witness, in the same manner as judges are in

¹ Per Erle, C. J., *Reg. v. Shaw*, 10 Cox, C. C. 66, 72.

² 3 Stark. Ev. 860, n. (g), 3rd Ed.

³ *Champney's case*, 2 Lew. C. C. 258.

⁴ See 3 Gr. Russ. 78 *et seq.*, 4th Ed., and the cases cited *infra*. The same was also laid down by Cresswell, J., in *R. v. Young*, Kent Sum. Ass. 1853, MS.

⁵ 1 Greenl. Ev. § 257, 7th Ed.; Tayl. Ev. § 876, 4th Ed.; *R. v. Gardiner*, 8 C. & P. 739; *R. v. Yates*, C. & Marsh. 159.

the habit of requiring (for the law does not require it) the testimony of an accomplice to be corroborated; or as the testimony of a woman must be corroborated, who seeks to fix a man with the maintenance of a bastard child. When the legislature require the testimony of a suspected witness to be *corroborated*, they say so; as in the repealed statute, 4 & 5 Will. 4, c. 76, s. 72, where it is enacted, that no order in bastardy shall be made, unless the evidence of the mother of the child "shall be corroborated in some material particular by other testimony, to the satisfaction of the court;" and similar words are used in the 7 & 8 Vict. c. 101, s. 3, the 8 & 9 Vict. c. 10, s. 6, and the 32 & 33 Vict. c. 68, s. 2. When, on the other hand, they require the positive testimony of two witnesses to fix a party with some offense, they are equally explicit. Thus the 1 Edw. 6, c. 12, s. 22, says, that the prisoner shall "be accused by two sufficient and lawful witnesses;" the 5 & 6 Edw. 6, c. 11, s. 12, says, he "shall be accused by two lawful accusers;" the 7 & 8 Will. 3, c. 3, s. 2, says, he shall be condemned "upon the oaths and testimony of two lawful witnesses;" and the 11 & 12 Vict. c. 12, s. 4, that he shall not be condemned unless the words spoken "shall be proved by two credible witnesses." This difference in the wording of these two classes of statutes can scarcely have been accidental: and, to show that corroborating the testimony of one witness, and convicting on the evidence of two, are not synonymous expressions, take the following case. Suppose an assignment of perjury, that on the trial of A for stealing the goods of B, the defendant

[* 757] * falsely swore that, at such a time, at C, he saw A take and carry away those goods: and

that in order to prove the falsity of this, D and E were called as witnesses; D to show that at the time mentioned in the evidence of the defendant he was at F; and E to show that A was at that time at G; this evidence, if believed,¹ would be sufficient to support the charge of perjury; and yet it is obvious that one of these alibis might be false and the other true,—so that the evidence of E does not necessarily, or at least not directly, *corroborate* that of D, or vice versa.

§ 609. It becomes, therefore, a question whether the old rule and reason of the matter are satisfied, unless the evidence of each witness has an existence and probative force of its own, independent of that of the other: so that supposing the charge were one in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury; or would at least raise a strong suspicion of the guilt of the defendant. And by analogy to this, where the evidence is,—as it undoubtedly may be by law,—wholly circumstantial, whether enough must not be proved by each witness to form a case fit to be left to the jury, if the artificial rule requiring two witnesses did not intervene; or whether it would be sufficient, if the evidence of one witness were such as to raise a *violent* presumption of guilt, and that of another a reasonable suspicion of it.—“*Præsumptio violenta valet in lege.*”²

§ 610. To test this view of the law by the decisions and language of judges. In *R. v. Parker*,³ Tindal,

¹ See per Patteson, J., in *R. v. Roberts*, 2 Carr. & K. 614; and per Byles, J., in *R. v. Hook*, 1 Dears. & B. 606.

² Jenk. Cent. 2, Cas. 3; see Co. Litt. 6 b; and *supra*, ch. 2, § 317.

³ C. & Marsh. 646.

C. J., says, "With regard to the crime of perjury, the law says, that where a person is charged with [* 758] that offense, it is not enough to disprove what he has sworn, by the oath of one other witness; and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstances, to supply the place of a second witness, it is not enough." In *Champney's case*,¹ Coleridge, J., said, that "one witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed Lord Tenterden, C. J., was of opinion that two witnesses were necessary to a conviction;" and the reporter adds, that the doctrine of *Champney's case* was ruled by the same judge in a case of *R. v. Wigley*. In *R. v. Yates*,² Coleridge, J., also said, "the rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only is not sufficient to warrant a conviction." In *R. v. Gardiner*,³ the defendant was indicted for perjury, in falsely deposing before a magistrate that the prosecutor had had a venereal affair with a donkey, and that the defendant saw that the prosecutor had the flap of his trousers unbuttoned and hanging down, and that he saw the inside of the flap. To disprove this the prosecutor and his brother were examined. The former negatived the whole statement of the defendant; and both witnesses stated that they went to the field mentioned in the deposition; and that the prosecutor parted from the brother to see whether the donkey, which was full in

¹ 2 Lew. C. C. 258.

² 8 C. & P. 737.

³ C. & Marsh. 139.

foal, was able to go a certain distance; that he was absent about three minutes; and that the trousers he had on, which were produced, had no flap. On this Patteson, J., said, "I think that the corroborative evidence is quite sufficient to go to the jury." Here was an important piece * of real evidence spoken to by two witnesses.

In the case of *R. v. Roberts*,¹ also, the same [* 759] judge said, "If the false swearing be, that two persons were together at a certain time; and the assignment of perjury be, that they were not together at that time; evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be sufficient proof of the assignment of perjury." And, lastly, in *R. v. Mayhew*,²—where the defendant, an attorney, was indicted for perjury in an affidavit made by him in opposition to a motion to refer his bills of costs for taxation,—one witness was called to prove the perjury, and in lieu of a second it was proposed to put in the defendant's bills of costs which he had delivered. On this being objected to, Lord Denman, C. J., said, "I have quite made up my mind that the bill delivered by the defendant is sufficient evidence; or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." Sir W. D. Evans tells us that he recollects having seen this principle acted on in practice in his time;³ though there is an old case in *Siderfin* to the contrary.⁴ The question as to the quantity of evidence required on a prosecution for perjury was also fully discussed before the Court of Criminal Appeal,

¹ 2 Car. & K. 614.

³ 2 Ev. Poth. 280.

² 6 C. & P. 315.

⁴ *R. v. Carr*, 1 Sid. 419; Resol. 3.

in a case of *R. v. Boulter*,¹ which, however, disposed of it on the special circumstances, without laying down any general principle. And probably the soundest view of this subject is that stated by Erle, C. J., in *Reg. v. Shaw*,² viz., that the degree of corroborative evidence requisite in such cases must be a matter for the opinion of the tribunal which tries the case, which must see that it deserves the name of corroborative evidence.

Proof of wills.

[* 760] *§ 611. 2. The next exception is on the proof of wills attested by more than one witness, in the manner formerly required by the Statute of Frauds, 29 Car. 2, c. 3, s. 5, and now by the 7 Will. 4 & 1 Vict. c. 26, and 15 & 16 Vict. c. 24.³ The practice under both these statutes is thus stated in a text-book. "Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary, at law, to call one of them; and the same rule prevails in Chancery, *excepting* in the case of *wills*, with respect to which it has for many years been the invariable practice of courts of equity, to require that all the witnesses who are in England, and capable of being called, should be examined. The reasons for this exception appear to be, that frauds are frequently practiced upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir at law has a right to demand proof of this fact, from every one of the witnesses whom the statute has placed about his ancestor. These will probably be deemed satisfactory reasons for the rule; but should the sound-

¹ 2 Den. C. C. 396.

² See bk. 2, pt. 3, ch. 1, § 222.

³ 10 Cox, C. C. 66, 72.

ness of the reasons admit of any doubt, the inflexibility of the rule admits of none; and it applies in full force, even to issues which are directed by a court of equity to be tried by a jury. On such occasions, it is usual to say that all the subscribing witnesses must be called, in order to satisfy the conscience of the Lord Chancellor.”¹

Trial by witnesses.

§ 612. 3. Another exception to this rule was in the “Trial by witnesses,” or, as our old lawyers expressed it, “Trial by proofs,”²—expressions used in our books

¹ Tayl. Ev. § 1652, 4th Ed. See also 2 Ph. Evid. 463, 10th Ed.; *Bowman v. Bowman*, 2 M. & Rob. 501; *M’Gregor v. Topham*, 3 Ho. Lo. Cas. 132.

² The existence of this exception to the general rule of evidence having been doubted, and even denied, we propose, in this note, to lay before our readers the arguments and authorities on the subject. Most of the modern treatises on evidence make no mention of the exception; and in some of the earlier editions of Mr. Phillips’ work (see 7th Ed., A. D. 1829), *Shotter v. Friend*, Carth. 142, is cited as a ground for its rejection, where Lord Chief Justice Holt is reported to have said, p. 144, although the case did not turn on the point now under consideration, “it was not necessary in any case, at common law, that a proof of matter of fact should be made by more than one witness; for a single testimony of one credible witness was sufficient to prove any fact; and the authorities cited in 1 Inst. 6 b, did not warrant that opinion, which was there founded on them.” In the report of the same case in 1 Shower, 158, 172, by the name of *Shatter et ux. v. Friend*, the Lord Chief Justice is mentioned as citing, in support of his position, F. N. B. 97, and 23 or 33 Hen. VI. 8 (probably meant for 33 Hen. VI. 8, pl. 23); but, on the other hand, Eyres, J., is represented as saying (p. 161), that “where trial is not by jury, but *per testes*, there must be two in all cases:” so that the dicta in that case go far to neutralize each other. A third report is to be found in Holt, 752, which, both in the name and substance of the case, agrees with that in Carthew. The authorities cited by the Lord Chief Justice, at the utmost only show that two witnesses were not required to prove the summons of the tenant in a real action, if, indeed, they go so far; but they certainly do not, in any degree, touch the general question; and his attack on those cited in the 1 Inst. seems founded on what is either wrong reference or misprint. That passage (Co. Litt. 6 b) runs thus: “It is to be known that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove the summons of the tenant, or the challenge of a juror, and the like. But when the trial is by verdict of twelve men, there the judgment is not given upon witnesses or other kind of evidence, but upon the verdict; and upon such evidence as is given to

[* 761] * to designate a few cases which were tried by the judges instead of a jury. It is not easy to

the jury, they give their verdict." For this, in, we believe, all the editions of Coke upon Littleton, certainly both in that of 1633 and the last one of 1832, are cited Mirror, c. 3; Plowd. 10; Bract. lib. 5, fol. 400. Now the last two of these are wholly irrelevant, and were most probably inserted by mistake for Plowd. 8 and Bract. lib. 5, fol. 354 b, which are cited by Sir Edw. Coke in 3 Inst. 26, when speaking of two witnesses in cases of treason, and are certainly some authority in his favor; and his remaining quotation, the Mirror, c. 3 (see sect. 12), expressly states it to be a good exception of summons, that the party "was not summoned, or not reasonably summoned, or that he received the summons by no freeman, or but by one freeman."

Many other authorities might be cited to establish the position that two witnesses are required on a trial by witnesses; and what is more important, they generally agree in the reason for this, namely, the absence of a jury. Thus, Lord Chief Baron Gilbert says, "There are some cases in the law where the full evidence of two witnesses is absolutely necessary; and that is, first, where the trial is by witnesses only, as in the case of a summons in a real action: for one man's affirming is but equal to another's denying, and where there is no jury to discern of the credibility of witnesses, there can be no distinction made in the credibility of their evidence; for the court doth not determine of the preference in credibility of one man to another, for that must be left to the determination of the neighborhood; therefore, where a summons is not made and proved by two witnesses, the defendant may wage his law of non-summons, &c." Gilb. Ev. 151, 4th Ed. The authority of Coke has been already referred to, and in another part of the 1st Inst. (viz. 158 b) he tells us that the proof of the summons of the jurors to try an assize must be made by two summoners, at the least; for which he cites *Mirr. c. 2, s. 19*, *Bract. lib. 5, fol. 333, 334*, *Fleta, lib. 6, c. 6*, and *Britt. c. 121*. The first of these is irrelevant, and probably a mistake for *Mirr. c. 3, s. 12*, already mentioned; the other three are all to the effect that there must be two summoners. In *Reniger v. Fogassa*, H. 4 Edw. VI., *Plowd. 12*, *Brooke, Recorder of London*, says, *arguendo*, "It is true that there ought to be two witnesses, at least, where the matter is to be tried by witnesses only, as matters are in the civil law." So in 2 Ro. Abr. 675, *Evidence*, pl. 5, "Un testimoigne est bone, per *Atkins*, et *Hoke* dit doit estre 2 al meins, ou est trie per testimoigne." See, also, *Trials per Pais*, 363.

The general opinions of the middle ages render the existence of the exception in question extremely probable. Our old lawyers were by no means emancipated from the notion, the grounds of which we have examined *suprà*, § 597, p. 1076, note 1, that the divine law required two witnesses in every case, and that human legislation should be in accordance with it: see, in particular, *Plowd. 8*; *Fortescue, cc. 31 and 32*; and *3 Inst. 26*; but they considered this rule complied with when the issue was determined by a jury, who, in early times, were a sort of witnesses themselves; see bk. 1, pt. 2, § 119.

fix precisely what *these cases were. About one, indeed, there can be no question, viz., where, [* 762] on a writ of dower, the tenant pleaded that the husband of the demandant was still living;¹ and Finch,² relying on the obiter dictum * of the court in 8 Hen. VI. 23, pl. 7, says that it was the *only* [* 763] case in which trial by witnesses was allowed. But other authorities mention several more; *e. g.*, the summons of a tenant in a real action;³ the summons of a juror in an assize,⁴ and the challenge of a juror;⁵ and two viewers are said to have been required in an action of waste.⁶ Mr. Justice Blackstone endeavors to reconcile this discrepancy, by supposing that the plea of the life of the husband in a writ of dower was the only case in which the direct issue in the cause was tried by witnesses, all the other instances being of collateral matters.⁷ But it is not quite clear that in ancient times, issue taken on the death of the husband in a *cui in vitâ*,⁸ and in some other cases,⁹ was not tried by witnesses; and with respect to the action of dower, although modern authorities speak of the above plea as a plea in bar,¹⁰ some of the old authorities treat it as a dilatory plea.¹¹ Real and mixed ac-

¹ 3 Blackst. Comm. 336; Finch, Law, 423; 8 Hen. VI. 23, pl. 7; 56 Hen. III., cited 2 Rol. Abr. 578, pl. 14.

² Finch, *in loc. cit.*

³ Co. Litt. 6 b; Gilb. Ev. 151, 4th Ed.

⁴ Co. Litt. 158 b.

⁵ Co. Litt. 6 b. This probably means an objection to the sufficiency of the summons of a juror in a real action; see 2 Hawk. P. C. c. 25, s. 131. Certain it is that no such rule is observed in modern practice when a juror is challenged.

⁶ Clayt. 89, pl. 150.

⁷ Blackst. Comm. 336.

⁸ 2 Edw. II. 24, tit. Cui in Vitâ.

⁹ See 36 Ass. pl. 6; 39 Id. pl. 9; 30 Id. pl. 26; 43 Ass. pl. 26.

¹⁰ Com. Dig. Pleader, 2 Y. 9; 2 Wms. Saund. 44 d, 6th Ed.

¹¹ Bract. lib. 4, c. 7, fol. 301, 302; Dyer, 185 a, pl. 65.

tions are now abolished by 3 & 4 Will. 4, c. 27, s. 36, and 23 & 24 Vict. c. 126, s. 26; but it may be a question whether two witnesses are not still required when, in an action for dower brought in the form given by the latter act, the death of the husband is disputed.

§ 613. The evidence on this kind of trial need not be direct — it is sufficient if the witnesses speak to circumstances, giving rise to a reasonable intendment or presumption * of the truth of the fact which they
 [* 764] are called to prove.¹

Claims of villenage or niefty.

§ 614. 4. There seems to be some difference among the authorities as to whether two witnesses were required on a claim of villenage or niefty.² If such were the rule, it was a good one in favorem libertatis; but it is needless to pursue the inquiry at the present day.

Exceptions created by statute — First. Trials for treason and misprision of treason.

§ 615. We now proceed to the statutory exceptions. Of these the most important and remarkable is found in the practice on trials for high treason and misprision of treason. The better opinion and weight of authority are strongly in favor of the position, that at the common law a single witness was sufficient in high treason, and a fortiori in petty treason or misprision of treason.³ In the 3

¹ *Thorne v. Rolff*, Dyer, 185 a, pl. 65; 1 Anders. 20, pl. 42.

² See Britton, c. 31; 2 Rol. Abr. 675, Evidence, pl. 3; F. N. B. 78, H.; and Fitz. Abr. Villenage, pl. 39.

³ 2 Hawk. P. C. c. 25, s. 131, and c. 46, s. 2; Foster, Cr. Law, 233; 1 Greenl. Ev. § 255, 7th Ed.; Taylor, Ev. § 869, 4th Ed.; *The Case of Clipping*, T. Jones, 263; Bro. Abr. Corone, pl. 219; Dyer, 132, pl. 75; Kel. 18 and 49; 1 Hale, P. C. 297-301, 324; 2 Id. 286, 287.

Inst. 26, however, Sir Edward Coke says, "It seemeth that by the ancient common law, one accuser or witness was not sufficient to convict any person of high treason. * * * And that two witnesses be required, appeareth by our books" (here he cites several authorities, all of which relate to the two witnesses required on a trial by witnesses,¹ and having no reference to treason or criminal proceedings), "and I remember no authority in our books to the contrary: and the common law herein is grounded upon the law of God, expressed both in the Old and New Testament; Deut. xvii. 6, xix. 15; Matt. xviii. 16; John, xviii. 23 (perhaps meant for John, viii. 17); 2 Cor. xiii. 1; Heb. x. 28; **In ore duorum aut trium testium peribit qui interficietur; Nemo occidatur uno contra se di-* [* 765] *cente testimonium.*" Now supposing these and similar passages of Scripture to be applicable to municipal law at all,² a decisive answer to Sir Edw. Coke is given by Serjeant Hawkins,³ viz., that his argument proves too much; for that "whatsoever may be said either from reason or Scripture for the necessity of two witnesses in treason, holds as strongly in other capital causes, and yet it is not pretended that there is, or ever was, any such necessity in relation to any other crime but treason." Besides, the authority of some parts of the 3rd Institute has been doubted.⁴ Perhaps the hypothesis offered in a former part of this chapter, respecting the origin of the rule requiring two witnesses in perjury, may assist us here also, viz., that our old lawyers considered two witnesses necessary on all criminal charges, including trea-

¹ See *suprà*, § 612, p. 1108, note 2.

² See on this subject *suprà*, § 597, p. 1076, note 1.

³ 2 Hawk. P. C. c. 25, s. 131.

⁴ Kely. 49.

son; but deemed this requisite complied with when the trial was by jury, who, in those days, were looked on as witnesses.¹

§ 616. Taking for granted then, that at common law, a charge of treason might be maintained on the testimony of a single witness, the statutes on the subject are as follow. The 1 Edw. 6, c. 12, after repealing several statutes by which various treasons and felonies were created, enacts, in its 22nd section, that no person shall be indicted, arraigned, condemned or convicted for treason, petit treason, misprision of treason, &c., unless he shall be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same. And by the 5 & 6 Edw. 6, c. 11, s. 12, no person shall be indicted, arraigned, condemned, convicted or attainted for any treason, &c., unless he shall be accused by two lawful [* 766] *accusers; which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before him, and avow and maintain what they have to say against him, &c.; unless he shall willingly without violence confess the same. But the subsequent statute, 1 & 2 P. & M. c. 10, s. 7, having directed that all trials for treason should be had and used only according to the due order and course of the common law, and not otherwise, the judges of those days doubted, or affected to doubt, whether the above-mentioned statutes of Edward VI. were not repealed. The question was raised in several cases, and the doubt finally overruled in the time of Charles II.²

§ 617. Several other points were raised on the construction of those statutes, which are now interesting

¹ *Suprà*, § 603.

² Fost. C. L. 237.

only as a matter of legal history ;¹ for the modern law on this subject is contained in the statute 7 & 8 Will. 3, c. 3, "For regulating of Trials in Cases of Treason and Misprision of Treason." The second section of that statute enacts, "that no person shall be indicted, tried, or attainted of high treason, whereby any corruption of blood may or shall be made to any such offender, &c., or of misprision of treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason ; unless the party indicted, and arraigned, or tried, shall willingly without violence, in open court, confess the same, or shall stand mute, or refuse to plead."

Reasons for this alteration in the common law.

§ 618. Various reasons have been suggested for this alteration of the common law. At the trial of Viscount Stafford,² in 1680, before the House of Lords, Lord *Chancellor Finch, we are informed, "was pleased to communicate a notion concerning the [* 767] reason of two witnesses in treason, which he said was not very familiar he believed ; and it was this, anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use over all the Christian world, none can be condemned of heresy but by two lawful and credible witnesses ; and bare words may make a heretic, but not a traitor, and anciently heresy was treason ; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason." This explanation certainly receives some color from one of the statutes

¹ See Fost. C. L. 232-240.

² T. Raym. 407, 408.

repealed by the 1 Edw. 6, c. 12, namely, the 25 Hen. 8, c. 14, s. 6, which enacted that no person should be presented or indicted of heresy, unless duly accused and detected thereof by two lawful witnesses at the least. But heresy being an ecclesiastical offense, it was reasonable to adopt the ecclesiastical rules of proof when it was made the subject of secular punishment; besides, it is an offense of a character which would justify the throwing almost any amount of protection round persons accused of it. Others consider the rule based on this — that, the accused having taken an oath of allegiance, where a single witness bears testimony to treason committed by him, there is only oath against oath.¹ But this reasoning is far from satisfactory; for the accused may never have taken an oath of allegiance, and even if he has, all oaths are not observed with equal fidelity. Besides, the 1 Edw. 6, c. 12, extends the rule to cases of *petty* treason, and to the speaking of certain words rendered punishable under that act by imprisonment and forfeiture of goods. The true reason for requiring two witnesses in high treason and misprision of treason — unquestionably that which influenced the framers of the modern *stat-
 [* 768] utes on the subject, whatever may have been the motives of those of the earlier ones — is the peculiar nature of these offenses, and the facility with which prosecutions for them may be converted into engines of abuse and oppression.² For although treason, when clearly proved, is a crime of the deepest dye, and deservedly visited with the severest punishment, yet it is one so difficult to define — the line between treasonable conduct and justifiable resistance to the encroachments

¹ 4 Blackst. Comm. 358.

² 4 Blackst. Comm. 358; Gilb. Ev. 152, 4th Ed.

of power, or even the abuse of constitutional liberty, is often so indistinct—the position of the accused is so perilous—struggling against the whole power and formidable prerogatives of the crown—that it is the imperative duty of every free state to guard, with the most scrupulous jealousy, against the possibility of such prosecutions being made the means of ruining political opponents.¹ With this view the 7 & 8 Will. 3, c. 3, besides requiring two witnesses as already stated, enacts, *inter alia*, that no person shall be tried for any of the treasons therein mentioned, except attempts to assassinate the king, unless the indictment be found within three years after the offense committed;* that the accused shall have a copy of the indictment five days before the trial,² and a copy of the jury panel two days before the trial.³ And by the 7 Anne, c. 21, s. 11 (in part repealed and re-enacted by 6 Geo. 4, c. 50), a copy of the indictment, a list of the witnesses to be produced, and of the jurors impaneled, are to be delivered to him a certain time before the trial, &c. All these protections have been taken away by subsequent statutes, from certain cases of treason and misprision of treason, which, though within the letter, are certainly not within the spirit of the former enactments, viz., where the overt acts of treason charged in the indictment *are the assassination of the sovereign, or any direct attempt against his life or person.⁴ [* 769]

¹ Gilb. Ev. 152, 4th Ed.

² 7 & 8 Will. 3, c. 3, s. 6.

³ *Id.* sect. 1.

⁴ *Id.* sect. 7.

⁵ 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51.

Objections to it—Fallacy of them.

§ 619. The principle of the 7 & 8 Will. 3, c. 3, requiring two witnesses in treason has, however, been severely attacked. Bishop Burnet, speaking of that statute shortly after it was passed, said the design of it seemed to be to make men as safe in all treasonable conspiracies and practices as possible;¹ but he afterward makes some observations which it would be difficult to reconcile with this language.² Bentham, as might be expected, strongly condemns it;³ but his chief arguments are directed against the portions now repealed by the 39 & 40 Geo. 3, c. 93, and the 5 & 6 Vict. c. 51.⁴ He observes, however, that after the passing of this statute, "a minister might correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries, and be safe. * * * * As to the other provisions, then, all of them have their merit, some of them were no more than the removal of barefaced injustice; but as to this, it was specially leveled, not against false accusations, but against true ones."⁵ In Taylor on Evidence also⁶ we find this passage: "A man of calm reflection may think that the legislature would confer no trifling benefit on the country, if it defined the law of treason with greater accuracy, and if, by abolishing alike the cruelties which make it abhorrent, and the protections which make it ridiculous, it rendered the

¹ Fost. C. L. 221; 5 Benth. Jud. Ev. 489.

² Fost. *in loc. cit.* The passages referred to will be found in Burnet's History of his own Times, vol. 2, p. 141, Ed. 1734.

³ 5 Benth. Jud. Ev. 485-495.

⁴ See *supra*, § 618, and *infra*, bk. 4, pt. 1, ch. 2.

⁵ 5 Benth. Jud. Ev. 490.

⁶ Tayl. Ev. § 871, 5th Ed.

punishment of traitors more certain and less barbarous." All this reasoning, however, is more specious than sound. * It seems based, in some degree at least, on the false principle that has been examined in the [* 770] Introduction to this work,¹ and which is to be found more or less in every part of Bentham's Treatise on Judicial Evidence, viz., that the indiscreet passiveness of the law is as great an evil as its corrupt or misdirected action; and consequently, that the erroneous conviction and punishment of an innocent, a violent, or even a seditious man, for the offense of treason, works the same amount of mischief as the escape of a traitor from justice, and no more. Besides, the above authors appear to have assumed, that in the case put of ministers corresponding with attainted persons by means of a single emissary, and such like, the incapacity to prosecute for *treason* involves impunity to the criminal. They forget that there has always been such an offense as *sedition*, which, being only a misdemeanor, may be proved by one witness, and which does not merge in the treason.² And of late years the legislature has created an intermediate offense between treason and sedition, by making various acts against the crown and government of the country felony, and severely punishable.³ By the law as it stands, persons sometimes escape with a conviction for felony or sedition whose conduct, considered with technical accuracy, amounts to treason; but on the other hand, those who are innocent of that terrible crime lie under no dread of being falsely accused of it; and when a conviction for treason does take place, it is on such unquestionable

¹ Introd. pt. 2, § 49.

² 4 Blackst. Com. 119; *R. v. Reading*, 7 Ho. St. Tr. 265-7.

³ 11 & 12 Vict. c. 12.

proof, that the blow descends on the disaffected portion of society with a moral weight, increased a hundredfold by the moderation of the executive in less aggravated cases. The extending the protection to charges of *petty* treason, as was done by 1 Edw. 6, c. 12, was idle; the 7 & 8 Will. 3, c. 3, it will be observed, avoided that; and [* 771] * the offense itself is now abolished by 9 Geo. 4, c. 31, s. 2.

Two witnesses not requisite to prove collateral matters.

§ 620. The rule requiring two witnesses in treason only applies to the proof of the overt acts of treason charged in the indictment—any collateral matters may be proved as at common law;¹ such as that the accused is a subject of the British crown,² and the like. Nor, perhaps, does it hold on the trial of collateral issues; as, for instance, where a prisoner convicted of treason makes his escape, and, on being retaken and brought up to receive judgment, denies his identity with the party mentioned in the record of conviction.³

2. *Other statutory exceptions.*

§ 621. There are other statutory exceptions to the rule in question. By the 7 & 8 Vict. c. 101, s. 3, and 8 & 9 Vict. c. 10, s. 6, already referred to,⁴ no order of affiliation shall be made against the putative father of a bastard child, unless the evidence of its mother be corroborated in some material particular by other testimony, to the satisfaction of the court; and the repealed enactment,

¹ Tayl. Ev. § 872, 4th Ed.; Fost. C. L. 240-2; 1 East, P. C. 130.

² Fost. C. L. 240; *R. v. Vaughan*, 13 Ho. St. Tr. 535, per Holt, C. J.

³ In such cases the prisoner has no peremptory challenge. *Ratcliffe's case*, Fost. C. L. 42.

⁴ *Suprà*, § 608.

4 & 5 Will. 4, c. 76, s. 72, contained a similar provision. So by the 32 & 33 Vict. c. 68, s. 2, which makes the parties to actions for breach of promise of marriage competent to give evidence therein, it is provided that no plaintiff in such action shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise. And another instance will be found in the 11 & 12 Vict. c. 12, s. 4, which enacts that no person shall be convicted of certain offenses made felony by that statute, "in so far as the same are * expressed, uttered, or declared by open or advised speaking, except upon his own [* 772] confession in open court, or unless the words so spoken shall be proved by two credible witnesses." Seventy-four statutes of this kind are said to have been passed between the 1 Edw. VI. (A. D. 1547) and the 31 Geo. III. (A. D. 1791).¹

When two witnesses, etc., are required, their credit is to be determined by the jury.

§ 622. Although, as has been shown in the present chapter, the law of this country requires a certain numerical amount of proofs in particular cases, it has avoided the great mistake into which the civilians fell, of attaching to those proofs an artificial weight, and leaves their value to the discrimination of a jury. From motives of legal policy no decision shall, in such cases, be based on the testimony of a single witness, however credible; but when more are adduced, be the number what it may, their testimony must, if untrustworthy in the eyes of the jury, go for nothing.

¹ 5 Benth. Jud. Ev. 483.

* BOOK IV. [* 773]

FORENSIC PRACTICE AND EXAMINATION OF WIT-
NESSES.

PART I.

FORENSIC PRACTICE OF COMMON-LAW COURTS WITH RESPECT
TO EVIDENCE.

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Rules which regulate forensic practice respecting evidence
— *Division.*

§ 623. The rules of evidence, especially such as relate to evidence in causâ, are *rules of law*, which a court or judge has no more right to disregard or suspend than any other part of the common or statute law of the land.¹ Those which regulate forensic practice are less inflexible; for, although the mode of receiving and extracting evidence is governed by established rules, a discretionary power of relaxing them on proper occasions is vested in the tribunal; and indeed it is obvious, that an unbending adherence, under all circumstances, to rules which are the mere *forma et figura judicii*, would impede rather than advance the ends of justice. The most convenient

¹ Bk. 1, pt. 1, §§ 80, 81, 86, and pt. 2, § 116.

way of treating the present subject will be, first to describe the course of a trial, and then to examine the practice relative to its principal incidents as connected with the matter before us. But before doing either of these, it is advisable to direct attention to certain proceedings previous to trial.

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* CHAPTER I.

PROCEEDINGS PREVIOUS TO TRIAL.

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1. *Inspection of documents in the custody or under the control of the opposite party — At common law.*

§ 624. 1. The common law laid down as a maxim, "Nemo tenetur armare adversarium suum contra se;"¹ in furtherance of which principle, it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other

¹ Co. Litt. 36 a; Wing. Max. 665.

with any evidence, parol or otherwise, to assist him in the conduct of his cause.¹ The maxim, at least when pushed to this extent, was certainly not stamped with the wisdom which, for the most part, marks the common law;² but the defect was in some degree remedied by the power of filing a bill in equity for the discovery * of evidence,—a process, however, alike circuitous and expensive. In modern times the [* 775] courts of common law took upon themselves to relax considerably the strictness of the ancient rule; and at length it became the established practice, that when a document, in which both litigant parties had a joint interest, was in the custody or control of one of them, under such circumstances that he might fairly be deemed trustee of it for both, the court would order an inspection and copy of it to be given to his adversary, if it were material to his suit or defense.³ Even this, however, fell far short of the requirements of justice; and the legislature at length interfered, in the 14 & 15 Vict. c. 99, by which the powers of the common-law courts in this respect were considerably extended. By the 6th section it is enacted, “Whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respect-

¹ See per Holt, C. J., 3 Salk. 363.

² The maxim seems to have been derived from the Roman law. Cod. lib. 2, tit. 1, l. 4. So in the Scotch law, “Nemo tenetur edere instrumenta contra se.” Halk. M. 100; Ersk. Inst. book 4, tit. 1, § 52.

³ *Charnock v. Lumley*, 5 Scott, 438; *Steadman v. Arden*, 15 M. & W. 587; *Goodliff v. Fuller*, 14 Id. 4; *Smith v. Winter*, 3 Id. 309; *Ley v. Barlow*, 1 Exch. 800; *The Metropolitan Saloon Omnibus Company v. Hawkins*, 4 H. & N. 146; *Shadwell v. Shadwell*, 6 C. B., N. S. 679; *Price v. Harrison*, 8 C. B., N. S. 617.

ively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity at the instance of the party so making application * as aforesaid to the said court or judge."

[* 776] In the construction of this statute it has been held, First. In accordance with the general rule respecting statutes having only affirmative words, it has not taken away the common law; and consequently, in every case in which a party could have obtained inspection before the statute, he may obtain it still, without reference to the statute at all.¹ Secondly. The power conferred on the courts of common law by this statute, to compel an inspection of documents, which the party applying can satisfy the court or judge are in the possession or under the control of the opposite party, can only be exercised in cases where such an inspection could be obtained by bill of discovery, or other proceeding in a court of equity. It does not enable them to compel a discovery whether certain documents, or whether any and what documents, relating to the cause, are in his possession or power.²

¹ *Bluck v. Gompertz*, 7 Exch. 67; *Sneider v. Mangino*, 7 Exch. 229; *Doe d. Child v. Roe*, 1 E. & B. 279; *Doe d. Avery v. Langford*, 1 B. C. C. 37; *Shadwell v. Shadwell*, 6 C. B., N. S. 679.

² *Hunt v. Hewitt*, 7 Exch. 236; *Rayner v. Allhusen*, 2 L., M. & P. 05; *Galsworthy v. Norman*, 21 L. J., Q. B. 70; *Scott v. Walker*, 2 E. & B. 555.

2. *Discovery, &c., of documents in the possession or power of the opposite party.*

§ 625. But far greater powers were conferred on the courts by the 17 & 18 Vict. c. 125, s. 50, which enacts as follows:—"Upon the application of either party to any cause or other civil proceeding in any of the superior courts, upon an affidavit of such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer, to be named, of such body corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters *in dispute, or what he knows as to the custody they or any of them are in, and whether [* 777] he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made, the court or judge may make such further order thereon as shall be just." But inspection under this enactment will be granted, only when it is applied for in a *bond fide* action; and it will therefore be refused when the court sees that the action has been brought, not to obtain redress from the defendant, but by means of an application for inspection, to get at evidence to be used in other proceedings against a third party.¹ Again, in granting inspection under this enactment, the court will follow the rule of courts of equity on a bill of discovery, namely, to refuse

¹ *Temperley v. Willett*, 6 E. & B. 380.

every application which is merely of a fishing nature.¹ But it has been held to be no answer to an application under this section, that the documents are such as the party is privileged from producing; for if such is the fact, it may be shown in the affidavit to be made in obedience to the rule directing inspection.²

Inspection of real or personal property.

§ 625a. 3. By section 58 of the same statute it is enacted, that either party to an action "shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury or by himself or by his witnesses, of any real or personal property, the inspection whereof may be material to the proper determination of the question in dispute." And it has been held that this section gives, as ancillary to the power to order inspection, the same power to order the removal of obstructions, with a view to inspection, as is exercised by courts of equity in like cases.³

Inspection in the Court of Admiralty.

[* 778] *§ 625b. 4. Similar powers to those mentioned in the last two sections are conferred on the Court of Admiralty by the 24 Vict. c. 10, ss. 17 and 18.

Inspection under patent law.

§ 626. 5. By the Patent Law Amendment Act, 15 and 16 Vict. c. 83, s. 42, it is enacted that "in any action in any of her Majesty's superior courts of record at West-

¹ *Gomm v. Parrott*, 3 C. B., N. S. 47; *Wright v. Morrey*, 11 Exch. 209; *Shadwell v. Shadwell*, 6 C. B., N. S. 679.

² *Forshaw v. Lewis*, 10 Exch. 712.

³ *Bennett v. Griffiths*, 3 E. & E. 467.

minster and in Dublin for the infringement of letters patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit." The "inspection," authorized by this section, is an inspection of the instrument or machinery manufactured or used by the parties, with a view to procuring evidence of infringement.¹ And it has been made a question whether the power of the court to grant such inspection is limited to granting an external inspection, or extends to enabling it to order a portion of the inspected article to be given up for analysis.²

Exhibiting interrogatories to a party in the cause.

§ 627. 6. But in providing for the compulsory discovery of evidence from litigant parties before trial, the 17 & 18 Vict. c. 125 has not only supplied deficiencies in the 14 & 15 Vict. c. 99, but introduced some entirely new machinery into the common-law system of evidence and forensic procedure. The following are the sections of that statute bearing on this matter :

"Sect. 51. In all causes in any of the superior courts, by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, * or either of them, by leave of the court or a judge, may, at any other time, deliver to the [* 779]

¹ *Vidi v. Smith*, 3 E. & B. 969, 974.

² *The Patent Type Founding Company v. Lloyd*, 5 H. & N. 192.

opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days, to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way ; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly.

“Sect. 52. The application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defense upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay ; provided that where it shall happen, from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

“Sect. 53. In case of omission, without just cause, to answer sufficiently such written interrogatories, it shall

be lawful for the court or a judge, at their or his * discretion, to direct an oral examination of the interrogated party, as to such points as they or [* 780] he may direct, before a judge or master; and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined, as aforesaid, or the production of any writings or other documents, to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such court or judge shall seem just."

"Sect. 54. Such rule or order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the 1 Will. 4, c. 22.

"Sect. 55. Whenever, by virtue of this act, an examination of any witness or witnesses has been taken before a judge of one of the said superior courts, or before a master, the depositions taken down by such examiner shall be returned to and kept in the master's office of the court in which the proceedings are pending; and office copies of such depositions may be given out, and the depositions may be otherwise used" in the same manner as in the case of depositions taken under the 1 Will. 4, c. 22.

"Sect. 56. It shall be lawful for every judge or master named in any such rule or order, as aforesaid, for taking examinations under this act, and he is hereby required to make, if need be, a special report to the court in which such proceedings are pending, touching such examination, and the conduct or absence of any witness or other person thereon, or relating thereto; and the court is hereby authorized to institute such proceedings, and make such

order and orders upon such report as justice may require, and as may be instituted and made in any case of contempt of the court.

"Sect. 57. The costs of every application for any *rule or order to be made for the examination of witnesses by virtue of this act, and of the [* 781] rule or order and proceedings thereon, shall be in the discretion of the court or judge by whom such rule or order is made."

§ 628. In carrying out the provisions of this enactment, the courts hold a tight hand; as otherwise it might be made a mere matter of course, to deliver interrogatories with the declaration and plea respectively in every case, thus needlessly adding to the expense of legal proceedings.¹ And there are several decisions to show that, in allowing interrogatories, the court will adhere to the established principles of evidence. Thus, interrogatories must be put within a reasonable range,² and must not be made the means of evading the rule which requires the production of primary evidence.³ So the party to whom they are administered possesses the privilege of other witnesses;⁴ and consequently he will not be compelled to state the contents of, or describe documents which are his muniments of title;⁵ nor, except under special circumstances, to answer questions tending to criminate him, or

¹ *Martin v. Hemming*, 10 Exch. 484; 18 Jurist, 1004, per Parke, B.; *Smith v. The Great Western Railway Company*, 2 Jurist, N. S. 668, 669, per Lord Campbell.

² *Robson v. Crawley*, 2 H. & N. 766.

³ *Herschfeld v. Clark*, 11 Exch. 712; *Moor v. Roberts*, 2 C. B., N. S. 671; *Wolverhampton Railway Company v. Hawkeford*, 5 C. B., N. S. 703.

⁴ Bk. 2, pt. 1, ch. 1, § 126 *et seq.*

⁵ *Adams v. Lloyd*, 3 H. & N. 351.

expose him to penalty or forfeiture.¹ Lastly, in proceeding under this statute the courts follow, in general, the principles established in courts of equity;² and therefore they will only allow interrogatories the object of which is to obtain *evidence to support the case of the party exhibiting them, and will refuse such [* 782] as are merely fishing, or directed to finding out the case of the opposite party.³

§ 629. Before dismissing this subject, we would remark that the 20 & 21 Vict. c. 85,—which establishes the Court for Divorce and Matrimonial Causes, and directs that the rules of evidence observed in the superior courts of common law at Westminster shall be applicable to, and observed in, the trial of all questions of fact in that court,—contains provisions for the interrogation of the parties to the suit in certain cases.

Admission of formal documents before trial.

§ 630. 7. The expense of proving documents which are formal in their nature, and not likely to be made the subject of dispute, was long felt to be a grievance. For remedy whereof, the R. G. H. 4 Will. 4, rule 20 (Practice),⁴ directs that “either party, after plea pleaded, and a reasonable time before trial, may give notice to

¹ See *Tupling v. Ward*, 6 H. & N. 749; *Edmunds v. Greenwood*, L. Rep., 4 C. P. 70; *Villeboisnet v. Tobin*, Id. 184; *Atkinson v. Fosbrooke*, L. Rep., 1 Q. B. 628; *May v. Hawkins*, 11 Exch. 210.

² *Pye v. Butterfield*, 5 B. & S. 829.

³ *Thöl v. Leask*, 10 Exch. 704; *Horton v. Bott*, 2 H. & N. 249; *Riccard v. The Inclosure Commissioners*, 4 E. & B. 329; *Whateley v. Crowter*, 5 E. & B. 709; *Edwards v. Wakefield*, 6 E. & B. 462; *Moor v. Roberts*, 2 C. B., N. S. 671.

⁴ Sect. 48.

⁵ Sects. 43, 46.

⁶ *Jervis's Rules*, 110–11, 4th Ed.

the other, either in town or country (in the form hereto annexed, or to the like effect) of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified [* 783] *in the notice, which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause. Provided, that if the judge shall think the application unreasonable, he shall indorse the summons accordingly. Provided also, that the judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit. If the party required shall consent to the admission, the judge shall order the same to be made. No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection, and in the absence of a special order the same shall be costs in the cause."

And the Common-Law Procedure Act, 1852—15 & 16 Vict. c. 76, enacts as follows with respect to the admission of documents :

"Sect. 117. Either party may call on the other party by notice to admit any document, saving all just exceptions ; and in case of refusal or neglect to admit, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable ; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to * give the notice is in the opinion of the master [* 784] a saving of expense.

"Sect. 118. An affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions.

"Sect. 119. An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served."

Under this statute certain rules were framed by the judges, which came into operation on the 1st day of H.

T. (January 11th), 1853; one of which, the 29th, is as follows:

"The form of notice to admit documents referred to in the Common-Law Procedure Act, 1852, s. 117, may be as follows:

In the Q. B. }
 C. P. } *A. B. v. C. D.*
 or Exchequer. }

Take notice, that the { plaintiff } in this cause pro-
 { defendant } poses to adduce in evidence the several documents here-
 under specified, and that the same may be inspected by
 the { defendant } his attorney or agent, at —, on
 { plaintiff }
 —, between the hours of —; and the { defendant }
 { plaintiff } is hereby required, within forty-eight hours from the
 last-mentioned hour, to admit that such of the said
 documents as are specified to be originals were respect-
 ively written, signed, or executed, as they purport
 respectively to have been; that such as are specified as
 [* 785] *copies are true copies; and such documents as
 are stated to have been served, sent, or deliv-
 ered, were so served, sent, or delivered respectively, saving
 all just exceptions to the admissibility of all such docu-
 ments as evidence in this cause. Dated, &c.

G. H., attorney

[or "agent"] { plaintiff }
 for { defendant. }

To E. F., attorney

[or "agent"] { defendant }
 for { plaintiff. }

The rule, then, gives a form for describing the docu-
 ments. And by rule 30, "In all cases of trials, writs of

inquiry, or inquisitions of any kind, either party may call on the other party, by notice, to admit documents in the manner provided by, and subject to, the provisions of the Common-Law Procedure Act, 1852; and in case of the refusal or neglect to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be; unless at the trial or inquisition, the judge or presiding officer shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense." And by R. G. Mich. Vac. 1854, rule 1, "The provisions as to pleadings and practice contained in the Common-Law Procedure Act, 1852" (15 & 16 Vict. c. 76), "and the rules of practice of the superior courts of common law made the 11th January, 1853, and also the rules of pleading which came into operation on the first day of Trinity Term, 1853, so far as the same are, or may be made, applicable, shall extend and apply to all proceedings to be had or taken under the Common-Law Procedure Act." 17 & 18 Vict. c. 125.

* CHAPTER II.

[* 786]

TRIAL AND ITS INCIDENTS.

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Course of a trial.

§ 631. I. Having in the first Book explained the nature of our common-law tribunal for the trial of facts, and the respective functions of judge and jury,¹ the course of a

¹ Bk. 1, pt. 1, §§ 82, *et seq.*

trial is soon described. The proceedings commence with a short statement to the jury of the questions they are about to try. In civil cases this is made by the plaintiff if he appears in person, by his counsel if he appears by counsel, and by his junior counsel if he has more than one, and is technically termed "opening the pleadings." In criminal cases, a summary of the charge against the accused, together with his plea thereto, and the issue joined, is stated to the jury by the officer of the court, and in some cases¹ by the counsel for the prosecution. On this the judge decides which of the contending parties ought to begin, and he then, either by himself or his counsel, states his case to the jury, and afterward adduces his evidence in support of it. In criminal cases, where no counsel is employed for the prosecution, the prosecutor cannot address the jury, and the evidence is gone into at once; for in contemplation of law the suit is that of the sovereign.² The opposite party is then heard in like order. If he adduces evidence, the opener has a right to address the jury in reply; but in prosecutions where the Attorney-General *appears officially, he, or his representative, has a right to reply, whether evidence is adduced or not;³ and this extends to proceedings in the Exchequer for penalties. In addressing the jury, a party has no right to state facts which he does not intend to adduce evidence to prove;⁴ and when this rule is violated, the judge may, in his discretion, allow a reply.⁵ [* 788]

¹ *I. e.*, in misdemeanors.

² Bk. 2, pt. 1, ch. 2, §§ 169, 183.

³ Resolutions of the judges, 7 C. & P. 676, Res. 5; *R. v. Horne*, 20 Ho. St. Tr 660-664; *R. v. Radcliffe*, 1 W. Bl. 3; *R. v. Marsden*, 1 Mood. & M. 439.

⁴ Bk. 1, pt. 1, § 94, and *infra*.

⁵ *Crerar v. Sodo*, 1 Mood. & M. 85; *Faith v. M'Intyre*, 7 C. & P. 44. The notion that this may be claimed as a *right* cannot be supported.

Where a fresh case, *i. e.*, a case not merely answering the case of the party who began, is set up by the responding party, and evidence is adduced to support such fresh case, the party who began may adduce proof of a rebutting case; his adversary has then a special reply on the new evidence thus adduced, and the opener a general reply on the whole case. By 17 & 18 Vict. c. 125, s. 18, "Upon the trial of any cause, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing, at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present:" and 28 & 29 Vict. c. 18, s. 2, enacts, "If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon

[* 789] * announcing his attention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be

allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening, or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." The party against whom real or documentary evidence is used has a right to inspect it, and if no valid objection to it appears, it will be read to the jury by the officer of the court. Every witness called is first examined by the party calling him, and this is denominated his "examination in chief." If an objection is made to his competency, he is interrogated as to the necessary facts, and this is called examination on the *voir dire*.¹ The party against whom any witness is examined has a right to "cross-examine him: after which the party by whom he is called may "re-examine" him, but only as to matters arising out of the cross-examination. The court and jury may also put questions to the witnesses, and inspect all media of proof adduced by either side. The court, generally speaking, is not only not bound by the rules of practice relative to the manner of questioning witnesses, and the order of receiving proofs, but *may in its discretion dispense with them in favor of parties or counsel. During the whole [* 790] course of the trial the judge determines all questions of law and practice which arise; and if the admissibility of a piece of evidence depends on any disputed fact, the

¹ Bk. 2, pt. 1, ch. 2, § 133, and Bk. 2, pt. 2, ch. 3, § 490.

judge must determine it, and for this purpose go into proofs, if necessary.¹

Counsel in criminal cases — Ancient practice.

§ 632. The common-law right of a party to appear by counsel, when that right is accorded to the other side, was long subject to a remarkable exception, *i. e.*, in cases of persons indicted or impeached for treason or felony. It was otherwise on prosecutions for misdemeanor;² as also on appeals of felony:³ and, even on indictments or impeachments for treason or felony, the exception was confined to cases where the accused pleaded the general issue, and did not extend to preliminary or collateral matters; such as pleas to the jurisdiction,⁴ pleas of sanctuary,⁵ or of *autrefois acquit*,⁶ the trial of error in fact to reverse outlawry,⁷ issues on identity when brought up to receive judgment,⁸ &c. And even on the trial of the general issue, if a point of law arose which the court considered doubtful, they assigned the accused counsel to argue it on his behalf.⁹ For the refusal of counsel to accused persons in these cases, the most serious and important which can come before a court of justice, several reasons are assigned in our old books. 1. That in criminal proceedings at the suit of the crown, the

¹ Bk. 1, pt. 1, § 82.

² 6 Ho. St. Tr. 797.

³ Dr. & Stud. Dial. 2, ch. 48; 9 Edw. IV. 2 A, pl. 4; 8 Ho. St. Tr. 726; Staundf. Pl. Cor. lib. 2, c. 63.

⁴ 11 Ho. St. Tr. 523–526.

⁵ *Humphrey Stafford's case*, 1 Hen. VII. 26 A.

⁶ 41 Ass. pl. 9.

⁷ *Burgesses case*, Cro. Car. 365.

⁸ *Ratcliffe's case*, Fost. Cr. Law, 40; 18 Ho. St. Tr. 434.

⁹ 9 Edw. IV. 2 A, pl. 4; 1 Hen. VII. 26 A.; Staundf. Pl. Cor. lib. 2, c. 63; 2 Hawk. P. C. 401.

* accused does not need the protection of counsel, seeing that it cannot be intended that the [* 791] crown is actuated by malice against him; whereas in appeals great malice on the part of the appellant must be intended, and consequently counsel ought to be allowed to the accused.¹ But although it is perfectly true that no malice against the accused can be intended in the crown, it is going a great way to extend so strong a presumption to its officers; who might also, even without any evil intention, and through mere error in judgment, pervert both its immense prerogative and their own abilities and legal acquirements, to procuring the condemnation of innocent persons. Besides, the argument proves too much; for, if sound, the rule ought to have extended to cases of misdemeanor. 2. That trial of the general issue is a trial not of matter of law, but of matter of fact, the truth of which must be better known to the accused than to his counsel;² an argument which also manifestly proves too much—for if worth any thing it is applicable to every cause, civil and criminal, unless where a point of law is expressly raised by demurrer or other proceeding where the facts are taken for granted. 3. That the accused ought not to be convicted unless his guilt is so manifest that defense by any counsel, however able, would be hopeless.³ One would naturally suppose that a defense which is hopeless must be harmless to the opposite side. 4. That if counsel were allowed in such cases they would raise trivial objections, and so the proceedings go on ad infinitum;⁴ an argument at direct vari

¹ Dr. & Stud. Dial. 2, ch. 48.

² Staundf. Pl. Cor. lib. 2, c. 63; Finch, Law, 386.

³ Inst. 29 and 137.

⁴ 11 Ho. St. Tr. 525; Staundf. Pl. Cor. lib. 2, c. 63.

ance with the ancient maxim of law, "*De morte hominis nulla est cunctatio longa.*"¹ The best answer to it, however, is that since counsel have been allowed in treason [* 792] and felony no such consequence has * followed. 5. That counsel are unnecessary, it being the duty of the court to be counsel for the prisoner;² a wretched misapplication of a noble constitutional maxim, namely, that if an accused person has no counsel, it is the duty of the court to see that he does not suffer for want of counsel; *i. e.*, to give him the benefit of any point of law in his favor, though through ignorance he cannot himself take advantage of it; to see that he is not oppressed by the legal ingenuity of the opposing advocates; and generally, to secure him a fair trial.³ But it is not possible, and would be indecorous if it were, for the court to act as counsel in the ordinary sense of the term, for an accused or any other party—in other words, to combine the incompatible functions of judge and advocate. Besides, although counsel were always allowed in cases of misdemeanor, we are not aware that when a person accused of a misdemeanor is undefended by counsel, the court is exonerated from the duty of seeing that he is convicted according to law. 6. That if the party defends himself, his conscience will, perhaps, sting him to utter the truth, or at least his gesture or countenance show some signs of it; and if they do not, still his speech may be so simple that the truth shall be thereby discovered sooner than by the artificial speech of learned men.⁴ When a prisoner's conscience stings him to utter the

¹ Co. Litt. 134 b.

² 3 Inst. 29 and 137; Dr. & Stud. Dial. 2, ch. 48.

³ That this is the true meaning of the maxim that the judge is the prisoner's counsel, see 5 Ho. St. Tr. 466, note; 6 Id. 516, note.

⁴ Staundf. Pl. Cor. lib. 2, c. 63; Finch, Law, 386; 2 Hawk. P. C. 400.

truth, the natural course for him is to plead guilty, and not reserve the disburdening of it for the jury ; and, for one man who in a case of any thing like difficulty has sufficient sense and nerve to defend himself with clearness and effect, twenty would injure even a good cause by their ignorance and confusion.

Alterations in more recent times.

*§ 633. It is not worth while to discuss the origin of this practice — whether it formed part [* 793] of the ancient common law, or, like many other abuses, crept in gradually.¹ We certainly find the practice clearly stated as above so early as the reign of Edward the Fourth ;² and from thence down to the alteration of the law after the Revolution of 1688, the prayer of the prisoner to be allowed to be defended by counsel, and the refusal of it by the court, formed the regular prologue to a state trial.³ At that period a heavy blow was aimed at the established practice by the stat. 7 & 8 Will. 3, c. 3, which, after reciting that “ nothing is more just and reasonable than that persons prosecuted for high treason and misprision of treason, whereby the liberties, lives, honor, estates, blood, and posterity of the subjects, may be lost and destroyed, should be justly and equally tried, and that persons accused as offenders therein should not be debarred of all just and equal means for defense of their innocencies in such cases,” enacts that every person so accused and indicted, arraigned or tried for any treason, whereby any corruption of blood may ensue,

¹ Vide Mirror of Justices, chap. 3, sect. 1 ; and Dr. & Stud. Dial. 2, ch. 48.

² 9 Edw. IV. 2, pl. 4. See, also, per Gascoigne, C. J., 7 Hen. IV. 35 b, pl. 4.

³ See the State Trials passim. Several of these cases are collected, 5 Ho. St. Tr. 466 *et seq.* (note).

&c., or misprision of such treason, shall be received and admitted to make their full defense by counsel learned in the law. A like law was extended to parliamentary impeachments by 20 Geo. 2, c. 30. And by 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51, s. 1, treasons where the overt act charged is the actual assassination of the sovereign, or other offense against his person, are to be tried in every respect as if the accused stood charged with murder.

Modern practice in felony.

§ 634. Although the 7 & 8 Will. 3, c. 3, did not
 [* 794] *extend to cases of felony, yet a practice gradually grew up during the last century, which continued until the reign of William the Fourth; by which the counsel for a prisoner were allowed to advise him during his trial; to take points of law in his favor; to examine and cross-examine witnesses on his behalf; and, in short, to do every thing except address the jury in his defense. But by the 6 & 7 Will. 4, c. 114, the whole anomaly was removed. That statute, after reciting that "it is just and reasonable that persons accused of offenses against the law should be enabled to make their full answer and defense to all that is alleged against them," enacts in its first section that "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defense thereto, by counsel learned in the law, or by attorney in courts where attorneys practice as counsel."

§ 635. In construing this statute several judges ruled that, when an accused person defends himself, he may state in his defense what facts he thinks proper, and

although he adduces no evidence to prove them the jury may weigh the credit due to his statement; but that counsel who defend prisoners are bound by the rule of practice in civil cases, viz., only to state such facts as they are in a condition to establish by evidence.¹ According to this dogma, when a prisoner's defense rests, as it often necessarily must rest, on an explanation of apparently criminating circumstances, his employing counsel causes his defense to be suppressed—a state of things hardly contemplated by the framers of the statute, and certainly at variance with the principles of natural justice. It is sought to defend this anomalous proceeding on the ground that the counsel for the accused may put his client's defense before the jury in * a hypothetical form:—but how feebly does [* 795] this tell in comparison with a straightforward explanation! Some judges have sought to qualify the rule by allowing the accused to make a statement of the facts he deems essential, leaving it to be commented on by his counsel; but this course has not been followed by other judges, and the practice on the subject cannot be considered settled.² It is worthy of observation that in cases of treason the prisoner is not only allowed, but invited by the court, to address the jury after his counsel have spoken for him.³

¹ *R. v. Beard*, 8 C. & P. 142; *R. v. Butcher*, 2 M. & Rob. 229; *R. v. Burrows*, Id. 124.

² *R. v. Malings*, 8 C. & P. 242; *R. v. Walkling*, Id. 243; *R. v. Olifford*, 2 Car. & K. 206; *R. v. Manzano*, 2 F. & F. 64. See also *R. v. Haines*, 1 F. & F. 86; and *R. v. Taylor*, Id. 535.

³ See *R. v. Watson*, 32 Ho. St. Tr. 538; *R. v. Thistlewood*, 33 Id. 894; *R. v. Ings*, Id. 1107; *R. v. Collins*, 5 C. & P. 311; *R. v. Frost*, 9 Id. 161, &c., &c. In *R. v. O'Coigly*, 26 Ho. St. Tr. 1191, 1374, Buller, J., gave the prisoners the option of addressing the court, either before or after their counsel had spoken.

Principal incidents of a trial—Ordering witnesses out of court.

§ 636. II. Proceeding to the second part of our subject: the first incident connected with a trial requiring particular notice is the practice of ordering witnesses out of court. When concert or collusion among witnesses is suspected, or there is reason to apprehend that any of them will be influenced by the statements of counsel or the evidence given by other witnesses, the ends of justice require that they be examined apart; and the court will proprio motu, or on the application of either party, order all the witnesses, except the one under examination, to leave court. This practice is probably coeval with judicature. “Si necessitas exegerit,” says Fortescue,¹ “dividuntur testes, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit, aut concitabit eorum alium ad consimiliter testificandum.” The better opinion, however, seems to be that this is not demandable *ex debito justitiæ*;² and there may be cases [* 796] * where it would be judicious to refuse it. It is said that the rule does not extend to the parties in the cause;³ nor, at least in general, to the attorneys engaged in it.⁴ A witness who disobeys such an order is guilty of contempt; but the judge cannot refuse to hear his evidence on that account,⁵ although the cir-

¹ C. 26.

² See the authorities collected 1 Greenl. Ev. § 432, 7th Ed.; Tayl. Ev. § 1259, 4th Ed.

³ *Charnock v. Dewings*, 3 Car. & K. 378; *Constance v. Brain*, 2 Jur., N. S. 1145; *Selge v. Isaacson*, 1 F. & F. 194.

⁴ *Pomeroy v. Baddeley*, Ry. & M. 430; *Everett v. Lownham*, 5 Car. & P. 91.

⁵ *Chandler v. Horne*, 2 Moo. & R. 423; *Cook v. Nethercote*, 6 C. & P. 743, and the cases there referred to; and per Lord Campbell in delivering the judgment of the court in *Cobbett v. Hudson*, 1 Ell. & B. 11, 14.

cumstance is matter of remark to the jury. In revenue cases in the Exchequer, indeed, it is said that his evidence is imperatively excluded.¹ And in order to prevent communication in such cases between witnesses who have been examined and those awaiting examination, it is a rule that the former must remain in court, or at least be watched until the latter are examined. Where the first witness examined was a respectable female, and some indelicate evidence was expected to be given by the others, it was arranged that she should be taken out of court and kept under observation in a separate apartment.²

Order of beginning, or right to begin.

§ 637. Next, with respect to the Order of Beginning, or Ordo Incipiendi. This is known in practice as the "Right to Begin:" not a very accurate expression—for it assumes that beginning is always an advantage, whereas it may be quite the reverse. There are few heads of practice on which a larger number of irreconcilable decisions have taken place. It is sometimes said that as the plaintiff is the party who brings the case into court, it is natural that he should be first heard with his complaint; and in one sense of the word the *plaintiff always begins; for, without a single exception, the pleadings are opened by him or [* 797] his counsel, and never by the defendant or his counsel. But, as it is agreed on all hands that the order of proving depends on the burden of proof; if it appears on the statement of the pleadings, or whatever is analogous to pleadings, that the plaintiff has nothing to prove—that

¹ Rosc. Cr. Ev. 127-8, 6th Ed.; 1 Greenl. Ev. 432, 7th Ed.; and Tayl. Ev. § 1260, 4th Ed.

² *Streeten v. Black*, Guildf. Sum. Ass. 1836, cor. Lord Abinger, C. B., MS.

the defendant has admitted every fact alleged, and takes on himself to prove something which will defeat the plaintiff's claim, he ought to be allowed to begin, as the burden of proof then lies on him. The authorities on this subject present almost a chaos. This much is certain, that if the onus of proving the issues, or any one of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin ;' and it seems that if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal, or mere matter of computation, here, also, the defendant may begin.' But the difficulty is where the burden of proving the issue, or all the issues, if more than one, lies on the defendant, and the onus of proving the amount of damage lies on the plaintiff. A series of cases (not an unbroken series, for there were several authorities the other way), concluding with that of *Cotton v. James*,³ in 1829, established the position that the onus of proving damages made no difference, and that, under such circumstances, the defendant ought to begin. Of these, the most remarkable is that of *Cooper v. Wakley*,⁴ in 1828; where it was held by Lord Tenterden, C. J., Bayley, Littledale and Parke, JJ., that in an action by a surgeon, for libel, imputing to him unskillfulness in performing [* 798] * a surgical operation, if the defendant pleads a justification, he is entitled to begin. Thus matters stood until the case of *Carter v. Jones*,⁵ in 1833, which also was an action for libel, to which a justification was

¹ *Wood v. Pringle*, 1 Moo. & R. 277; *James v. Salter*, Id. 501; *Curtis v. Wheeler*, 4 C. & P. 196; *Williams v. Thomas*, Id. 234.

² *Fowler v. Coster*, 1 Moo. & M. 241.

³ 8 C. & P. 505; 1 Moo. & M. 273.

⁴ 8 C. & P. 474; 1 Moo. & M. 248.

⁵ 6 C. & P. 64; 1 Moo. & R. 281.

pleaded; and, on the right to begin being claimed by the defendant, Tindal, C. J., before whom the case was tried, said that a rule on the subject had been come to by the judges. He then stated, *verbally*, the nature of that rule, but his language is given very differently in the two reports of the case. In the 6 Carrington & Payne, it is reported thus: "The judges have come to a resolution, that justice would be better administered by altering the rule of practice, in the respect alluded to, and that, in future, the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. * * * * It is most reasonable that the plaintiff, who brings the case into court, should be heard first to state his complaint." In the 1 Moody & Robinson it is reported thus: "A resolution has recently been come to by all the judges, that, in cases of slander, libel, and other actions where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." As might have been expected, many questions arose relative to the extent of this rule, and especially its applicability to actions of contract; but a new light was thrown on the whole subject by the case of *Mercer v. Whall*,¹ which came before the Court of Queen's Bench in 1845. Lord Denman, C. J., in delivering the judgment of the court, stated, p. 462, that the rule promulgated by Chief Justice Tindal, in *Carter v. Jones*, had originally been reduced to writing, and signed with the initials of several * of the judges, and was then in his own possession; that its terms were, that "in actions [* 799]

¹ 5 Q. B. 447.

for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant;" adding, p. 463, that that rule was not at all intended to introduce a new practice, but was declaratory or restitutive of the old, which had been broken in upon by *Cooper v. Wakley*, and that class of cases.¹ Since *Mercer v. Whall*, the subject seems to have been better understood: and whether the rule in *Carter v. Jones* is to be considered as declaratory or enacting, it certainly is a great step in the right direction, of restoring to the plaintiff his natural "right to begin," whenever he really has any thing to prove. In some instances the right to begin is regulated by statute.²

Erroneous ruling relative to, when rectified.

§ 638. Much of the confusion and inconsistent ruling on this subject may be traced to a notion which formerly prevailed, viz., that the order of beginning was exclusively to be determined by the judge at Nisi Prius, and consequently that the court in banc would not interfere to rectify any mistake, however gross, which might be committed in this respect.³ It would, it was argued, lead to much litigation and vexation if motions for new trials were entertained on such a ground; especially as, since the wrong decision of the judge would in all likelihood be founded on a misconception of the onus probandi, he would carry that erroneous view into his direction to the jury, in which case a new trial would

¹ It is remarkable that in all the cases decided on the construction of this rule between 1833 and 1845, and they are very numerous, not a single expression of any judge is to be found implying that it was declaratory in its nature.

² *E. g.*, 15 & 16 Vict. c. 83, s. 41.

³ *Bird v. Higginson*, 2 A. & E. 160; *Burrell v. Nicholson*, 1 Moo. & R. 304; *Ashby v. Bates*, 15 M. & W. 596, per Rolfe, B.

be grantable ex debito justitiæ for an inversion of the burden of proof. But in many cases, the fact of allowing * the wrong party to begin might be productive of the greatest mischief, although followed by [* 800] an unimpeachable summing up; and a series of authorities has now settled, that where the ruling of the judge with reference to the right to begin is erroneous in the judgment of the court in banc, and "clear and manifest wrong" has resulted from that ruling, a new trial will be granted by the court, not as matter of right, but as matter of judgment.¹

Advantage and disadvantage of having to begin.

§ 639. The right to begin is an advantage to a party who has a strong case and good evidence, as it enables him to make the first impression on the tribunal; and if evidence is adduced by the opposite side, it entitles him to reply, thus giving him the last word. But if the case of a party be a weak one; if he has only slight evidence, or perhaps none at all to adduce in support of it, and goes to trial on the chance (if defendant) of the plaintiff being nonsuited, or that the case of the opposite party may break down through its own extrinsic weakness; or trusting to the effect of an address to the jury; the fact of his having to begin might prove instantly fatal to his cause. Thus in *Edwards v. Jones*,² which

¹ *Geach v. Ingall*, 14 M. & W. 95; *Edwards v. Matthews*, 11 Jur. 398; *Brandford v. Freeman*, 5 Exch. 734; *Leete v. The Gresham Life Insurance Society*, 15 Jur. 1161; *Ashby v. Bates*, 15 M. & W. 589; *Booth v. Millns*, Id. 669; *Huckman v. Fernie*, 8 M. & W. 505 (as corrected in *Booth v. Millns*, *Edwards v. Matthews*, and *Brandford v. Freeman*); *Mercer v. Whall*, 5 Q. B. 447; *Doe d. Worcester Trustees v. Rowlands*, 9 C. & P. 736; *Doe d. Bather v. Brayne*, 5 C. B. 655.

² 7 C. & P. 633.

was an action by the indorsee against the maker of a promissory note, to which the defendant pleaded a long plea, amounting in substance to want of consideration for the note; to a portion of which the plaintiff replied, that there had been a good consideration given for it, and to the rest entered a nolle prosequi; the judge having ruled that the defendant should begin, his counsel was obliged to admit that he had no witnesses; and the [* 801] * judge immediately directed the jury to find a verdict against him.

Rule against stating facts without offering evidence of them — Matters of history.

§ 640. 3. We have already referred to the rule of practice which prohibits counsel, or the parties in civil cases,¹ and perhaps also the counsel for accused parties in criminal cases,² from stating any facts to the jury which they do not intend offering evidence to prove. This must not, however, be understood too literally. A counsel or party has a right to allude to any facts of which the court takes judicial cognizance, or the notoriety of which dispenses with proof.³ But more difficulty arises with respect to historical facts. A public and general history is receivable in evidence to prove a matter relating to the kingdom at large;⁴ probably for the same reason that the law permits matters of public and general interest to be proved by the declarations of deceased persons, who may be presumed to have had competent knowledge on the subject; or by old docu-

¹ *Supra*, §§ 631, 635.

² *Supra*, § 635.

³ Bk. 3, pt. 1, ch. 1, §§ 252-254.

⁴ B. N. P. 248; 2 Phill. Ev. 155, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

ments which, under ordinary circumstances, would be rejected for want of originality.¹ Although there are cases to be found in the books where histories have been received in evidence, and which it might be difficult to support on this principle.² But a history is not receivable to prove a private right or particular custom.³ In a recent case,⁴ it was held by the Court of Exchequer, that counsel, or a party at a trial, may refer to matters of general history, provided the license be exercised with prudence; but cannot *refer to particular books of history, or read particular passages from [* 802] them, to prove any fact relevant to the cause. Also that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the general course of composition, explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause. And Sir Edward Coke lays down — “*Authoritates philosophorum, medicorum et poetarum sunt in causis allegandæ et tenendæ.*”⁵

Practice respecting “Leading Questions” — General rule.

§ 641. 4. The chief rule of practice relative to the interrogation of witnesses is that which prohibits “*leading questions* ;” *i. e.*, questions which, directly or indirectly, suggest to the witness the answer he is to give. The rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary :

¹ Bk. 3, pt. 2, ch. 4, §§ 497, 499.

² See 2 Phill. Ev. 155–6, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

³ 2 Phill. Ev. 155, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

⁴ *Darby v. Ouseley*, 2 Jurist, N. S. 497; 1 H. & N. 1.

⁵ Co. Litt. 264 a.

in other words, that leading questions are allowed in cross-examination, but not in examination in chief. This seems based on two reasons. First, and principally, on the supposition that the witness has a bias in favor of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favorable to his side, or even put a false gloss upon the whole.¹ On all matters, however, which are merely introductory, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as other-

[* 803] wise * much time would be wasted to no purpose. It is sometimes said that the test of a leading question is, whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue;² but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable; as if, on traverse of notice of dishonor of a bill of exchange, a witness were led either as to the fact of giving the notice, or as to the time when it was given. So, leading questions ought not to be put when it is sought to prove material and proximate circumstances. Thus, on an indictment for murder by stabbing, the asking a witness if he saw the accused covered with blood and with a knife

¹ Ph. & Am. Ev. 887; 2 Ph. Ev. 461, 10th Ed.

² Rosc. Crim. Ev. 130, 6th Ed.

in his hand coming away from the corpse, would be in the highest degree improper, though all the facts embodied in this question are consistent with his innocence. In practice leading questions are often allowed to pass without objection, sometimes by express, and sometimes by tacit consent. This latter occurs where the questions relate to matters which, though strictly speaking in issue, the examining counsel is aware are not meant to be contested by the other side; or where the opposing counsel does not think it worth his while to object.

On the other hand, however, very unfounded objections are constantly taken on this ground. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned. On a question whether A and B were partners, it has been held not a leading question to ask if A has interfered in the business of B;¹ for, even supposing he had, that falls far short of constituting * him a partner. In an action for slander,² in saying of a tradesman that "he was in bank- [* 804] rupt circumstances, that his name had been seen in a list in the Bankruptcy Court, and would appear in the next Gazette;" a witness,—having deposed to a conversation with the defendant, in which he made use of the first two of these expressions,—was asked, "Was any thing said about the Gazette?" This was objected to as leading, but was allowed by Tindal, C. J. So, although there is no case where leading should be avoided more than when it is sought to prove a confession, still a witness who deposes to a conversation with the accused,

¹ *Nicholls v. Dowding*, 1 Stark. 81.

² *Rivers v. Hague*, C. B. Sittings after Mich. Term, 1837, MS.

may, after having first exhausted his memory in answering the question,—what took place at it, be further asked, whether any thing was said on such a subject, *i. e.*, on the subject-matter in the indictment. It should never be forgotten that “leading” is a relative, not an absolute term. There is no such thing as “leading” in the abstract—the identical words which would be leading of the grossest kind in one case or state of facts, would be not only unobjectionable, but the very fittest mode of interrogation in another.

Exceptions.

§ 642. There are some exceptions to the rule against leading. 1. For the purpose of identifying persons or things, the attention of the witness may be directly pointed to them. 2. Where a witness is called to contradict another, as to expressions out of court which he denies having used, he may be asked directly, Did the former witness use such and such words? The authorities are not quite agreed as to the reason of this exception;¹ and some strongly contend, that the memory of the second witness ought first to be exhausted, *by his being asked what the other [* 805] said on the occasion in question.² 3. The rule which excludes leading questions being chiefly founded on the assumption that a witness must be taken to have a bias in favor of the party by whom he is called, whenever circumstances show that this is not the case, and that he is either hostile to that party or unwilling to give evidence, the judge will, in his discretion, allow the rule

¹ *Edmonds v. Walter*, 3 Stark. 7.

² *Courteen v. Touse*, 1 Campb. 43; *Hallett v. Cousens*, 2 Moo. & R. 238.

³ Ph. & Am. Ev. 889; 1 Ph. Ev. 463, 10th Ed.

to be relaxed.¹ And it would seem that, for the same reason, if the witness shows a strong bias in favor of the cross-examining party, the right of leading him ought to be restrained; but the authorities are not quite clear about this.² 4. The rule will be relaxed, where the inability of a witness to answer questions put in the regular way, obviously arises from defective memory; or 5. From the complicated nature of the matter as to which he is interrogated.

Expediency of leading, when allowable.

§ 643. Although the not leading one's own witness when allowable is by no means so bad a fault as leading improperly, still it is a fault; for it wastes the time of the court, has a tendency to confuse the witness, and betrays a want of expertness in the advocate. There are, however, cases where it is advisable not to lead under such circumstances. Thus, on a criminal trial, where the question turns on identity, although it would be perfectly regular to point to the accused, and ask a witness if that is the person to whom his evidence relates, yet if the witness can, unassisted, single out the accused, his testimony will have more weight.

Discrediting the adversary's witnesses—1. *Evidence of general bad character for veracity*—2. *Statements by witness inconsistent with his evidence*—3. *Misconduct connected with the proceedings.*

§ 644. 5. One of the chief rules of evidence, as has been shown, is, that no evidence ought to be received

¹ Ph. & Am. Ev. 888; 2 Ph. Ev. 462, 10th Ed.

² See Rosc. Crim. Ev. 131, 6th Ed.; 2 Phill. Ev. 472-3, 10th Ed.; Tayl. Ev. § 1288, 4th Ed.

[* 806] *which does not bear, immediately or mediately, on the matters in dispute.¹ As a corollary from this, all questions tending to raise collateral issues, and all evidence offered in support of such issues, ought to be rejected. But many difficulties arise in practice, as to what shall be deemed a collateral issue with reference to the credit of witnesses. In addition to counter-proofs and cross-examination, there are three ways of throwing discredit on the testimony of an adversary's witness. 1. By giving evidence of his general bad character for veracity—*i. e.*, the evidence of persons who depose that he is, in their judgment, unworthy of belief, even though on his oath. And here the inquiry must be limited to what they know of his general character, on which alone that judgment should be founded; particular facts cannot be gone into.² "There are two reasons," says Parke, B., in the *Attorney-General v. Hitchcock*,³ "why collateral questions, such as a witness having committed some particular crime, cannot be entered into at the trial. One is that it would lead to complicated issues and long inquiries without notice; and the other that a man cannot be expected to defend all the acts of his life." And Alderson, B., in his judgment in that case,⁴ says: "The inconvenience of asking a witness about particular transactions, which he might have been able to explain if he had had reasonable notice that he would be required to do so, would be great—a man does not come into the witness-box prepared to show that every act of his life has been perfectly pure; and you therefore compel the opposite party to take his answer relative to the matter imputed, as otherwise you might

¹ Bk. 3, pt. 1, ch. 1.² *Id.*³ 11 Jurist, 478, 479.⁴ P. 481.

go on to try a collateral issue; and if you were allowed to try the collateral issue of the witness having committed some offense, you might call witnesses to prove that fact, and they again might likewise be cross-examined *as to their own conduct; and so you might go on proving collateral issues without [* 807] end before you could come to the main one. The rules of evidence stop this in the first instance, for the more convenient administration of justice, and you must therefore take the witness' answer, and indict him for perjury if it is false." 2. By showing that he has, on former occasions, made statements inconsistent with the evidence he has given. But this is limited to such evidence as is relevant to the cause; for a witness cannot be contradicted on collateral matters.¹ The 17 & 18 Vict. c. 125, s. 23, enacts: "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did, in fact, make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." By sect. 103, the enactments of this section apply and extend to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, ss. 4 and 1, contains similar provisions, applicable to all courts of judicature, as well criminal as all others. 3. By proving misconduct connected with the proceedings, or other circumstances showing that he does not stand indifferent between the

¹ 1 Stark. Evid. 189, 3rd Ed.; 2 Ph. Evid. 517 *et seq.*, 10th Ed.

contending parties.¹ Thus, it may be proved that a witness has been bribed to give his evidence,² or has offered bribes to others to give evidence for the party whom he favors,³ or that he has used *expressions of animosity and revenge toward the party against whom he bears testimony,⁴ &c. We must also direct attention to the following observations of Parke, B., in the *Attorney-General v. Hitchcock*.⁵ “Under the old law, when an objection was raised to the competency of a witness, he might be examined as to it on the voir dire, and evidence might be adduced to contradict his statement; and the issue thus raised was determined by the judge. * * * At that time those objections went to the disability of the witness; but it becomes an important question whether the same course should be adopted now, since Lord Denman’s Act, 6 & 7 Vict. c. 85, has provided that no person shall be excluded from giving evidence by reason of incapacity from crime or interest—is all evidence of his being interested to be excluded from the view of the jury?” This suggestion does not, however, appear to be followed in practice.

*Discrediting party’s own witnesses — At common law —
Meaning of “adverse” in this enactment.*

§ 645. 6. With respect to the right of a party to discredit his own witnesses; we will consider the matter,

¹ There are some authorities to the contrary; but they seem overruled by the *Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur. 478, and the cases there cited, and are indefensible on principle.

² *Langhorn’s case*, 7 Ho. St. Tr. 446, recognized in the *Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur. 478.

³ *Lord Stafford’s case*, 7 Ho. St. Tr. 1400, recognized in *The Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur. 478.

⁴ *Yewin’s case*, 2 Camp. 638. See ad id. *The Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur. 478.

⁵ 11 Jurist, 478, 480.

first, as it stood at the common law, and secondly, under the 17 & 18 Vict. c. 125, and 28 Vict. c. 18. First, then, of the common law. It was an established rule that a party should not be allowed to give *general* evidence to discredit his own witness, *i. e.*, general evidence that he is unworthy of belief on his oath. By calling the witness, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it; and if he afterward attack his general character for veracity, this is not only *mala fides* toward the tribunal, but, say the books, it "would enable the * party to destroy the witness if he spoke [* 809] against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him."¹ (a) A party might, however, discredit his own witness *collaterally* by adducing evidence to show that the evidence which he gave was untrue in fact.² (b) This does not raise the slightest presumption of *mala fides*; and it would be in the highest degree unjust and absurd if parties were bound by the unfavorable statements of witnesses with whom they have no privity, and who are frequently called by them

¹ B. N. P. 297; 2 Phill. Ev. 525, 10th Ed.

² 2 Ph. Ev. 526, 10th Ed.

(a) *Adams v. Wheeler*, 97 Mass. 67; *Stearns v. Merchants' Bank*, 53 Penn. St. 490; *Whitney v. East'n R. R. Co.*, 9 Allen (Mass.), 364; *Olmstead v. Winstead Bank*, 32 Conn. 278; *Rockwood v. Poundstone*, 38 Ill. 199; *Thorne v. Moore*, 21 Iowa, 285; *Norwood v. Kenfield*, 30 Cal. 393; *Platt v. Thorn*, 8 Bosw. (N. Y.) 574; *People v. Sheehan*, 49 Barb. (N. Y.) 217; *Thornton's Ex'r v. Thornton's Heirs*, 39 Vt. 122; *Coles v. Coles*, Law Rep., 1 P. & D. 138.

(b) *Bradford v. Bush*, 10 Ala. 386; *Medina v. Walker*, 22 N. H. 457; *Palmer v. Trower*, 14 Eng. Law & Eq. 417; *Brown v. Osgood*, 25 Me. 105; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Shelton v. Hampton*, 6 Ired. (N. C.) 216; *Com. v. Starkweather*, 11 Cush. (Mass.) 59; *Greenough v. Eccles*, 5 C. B. (N. S.) 786.

from pure necessity. But whether it was competent for a party to show that his own witness had made statements out of court inconsistent with the evidence which he had given in it was an unsettled point, on which, however, the weight of authority was in favor of the negative.¹ On the one hand it was urged that this falls within the principle of the general rule that a party must not be allowed directly to discredit his own witness; that to admit proof of contradictory statements would tend to multiply issues; that it would enable a party to get the naked statement of a witness before the jury, operating in fact as substantive evidence;³ that there would be some danger of collusion and dishonest contrivance, inasmuch as a witness might be induced to make a statement out of court for the very purpose of its being reserved, and afterward used in contradiction to him, and that the jury might regard such a statement as substantive evidence in the cause. Moreover, the use of oaths and the other sanctions of truth is to extract facts which parties might be willing to conceal, and the allowing a witness to be thus contradicted holds out an inducement *to him, to maintain by perjury *in court* [* 810] any false or hasty statements he may have made out of it. The following reasoning on the other side is taken from a work of authority:⁴ "It may be argued, the evidence is not open to the objection that the party would thus discredit his own witness by general testimony; that, although a party, who calls a person of bad character as witness, knowing him to be such, ought not

¹ See the cases collected, Tayl. Ev. § 1049, 1st Ed. ; 2 Ph. Ev. 528 *et seq.*, 10th Ed. ; and *Melhuish v. Collier*, 15 Q. B. 878.

² Ph. & Am. Ev. 904.

³ Tayl. Ev. § 1048, 1st Ed.

⁴ Ph. & Am. Ev. 905.

to be allowed to defeat his testimony because it turns out unfavorable to him, by direct proof of general bad character,—yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to the trial; that this course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favorable evidence (being really in the interest of the opposite party), and afterward by hostile evidence ruin his cause; that the rule, with the above exception, as to offering contradictory evidence, ought to be the same, whether the witness is called by the one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony is the same in both cases; that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked that this is a question in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences."

* Besides, it by no means follows that the object of a party in contradicting his own witness is [* 811] to impeach his veracity—it may be to show the faultiness of his memory.¹ In this state of the law the 17 & 18 Vict. c. 125, ss. 22, 103, was passed, which is in some

¹ Tayl. Ev. § 1047, 1st Ed.

respects only declaratory of the principles already laid down. That section enacts: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." It has been held by the Court of Common Pleas, that the term "adverse" in this section must be understood in the sense of the witness exhibiting a *hostile mind* toward the party calling him, and not merely in the sense that his testimony turns out to be "unfavorable" to that party;¹ and by the Court of Queen's Bench, that a statement contradicting the evidence of a witness under it may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of the witness.² By sect. 103, the enactments in this section apply and extend to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, ss. 3, 1, contains similar provisions applicable to all courts of judicature, as well criminal as others, &c.

Adjournment of trial.

§ 646. 7. While the indefinite, or even frequent adjournment *of its proceedings is at variance
[* 812] with the very nature of a judicial tribunal,³

¹ *Greenough v. Eccles*, 5 C. B., N. S. 786.

³ Introd. pt. 2, §§ 41 *et seq.*

² *Jackson v. Thomason*, 1 B. & S. 745.

still a power of adjournment in certain cases, exercised with due caution and discretion, is indispensable to the sound and complete administration of justice. On this subject, the Commissioners for inquiring into the process, practice, and system of pleading in the Superior Courts of Common Law, express themselves as follows: ' "It occasionally happens that a party is taken by surprise by his adversary's case; that a witness or a document becomes unexpectedly necessary, and is not forthcoming; that a document turns out to be attested, and the attesting witness is not present; or requires a stamp, but no stamp, or an insufficient one, has been affixed. In these and the like cases, miscarriage of justice must occur unless time is afforded to enable the deficient matter to be supplied. We think the rigorous inflexibility with which a cause once commenced is now carried on to its close, might be modified with advantage. No doubt encouragement should not be held out to parties to be negligent in getting up their proofs or coming unprepared to trial; but, on the other hand, it is important not to allow justice to miscarry, or parties to be put to the expense of another trial, when, by a temporary adjournment, a deficiency in proof may be supplied." These views have been carried into effect by 17 & 18 Vict. c. 125, s. 19, which enacts, that "It shall be lawful for the court or judge, at the trial of any cause, where they or he may deem it right for the purposes of justice to order an adjournment for such time, and subject to such terms and conditions as to costs, and otherwise, as they or he may think fit." By sect. 103, the enactment in this section applies and extends to every court of civil judicature in England and Ireland.

¹ Second Report, p. 10.

Ways of questioning the ruling of a tribunal on evidence
— In civil cases — Bill of exceptions — New trial.

[* 813] *§ 647. 8. There are two ways of questioning the ruling of a court or judge on matters of evidence in *civil* cases. 1. By bill of exceptions founded on the statute West. 2 (13 Edw. I.), c. 31, stat. 1 :— “Cum aliquis implacitatus coram aliquibus justiciariis, proponant exceptionem et petat quod justiciarii eam allocent, quam si allocare noluerint, si ille, qui exceptionem proponet, scribat illam exceptionem et petat quod justiciarii apponant sigilla in testimonium, justiciarii sigilla sua apponant; et si unus apponere noluerit, apponat alius de societate.” If a judge refuses to seal a bill of exceptions the party may have a compulsory writ against him, commanding him to seal it if the fact alleged be truly stated; and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return.¹ This bill of exceptions becomes part of the record; and, judgment being signed in the court below, is heard and determined by a court of error. 2. By application to the court in banc for a new trial. Bills of exceptions, although the regular and proper course provided by law for rectifying mistakes committed by judges at trials, fell into comparative disuse, partly through an absurd notion that the tendering a bill of exceptions was disrespectful to the judge, but principally to avoid expense and delay. Of late years they have become more frequent, and in matters of much weight and consequence ought in general to be resorted to. For, previous to the 17 & 18 Vict. c. 125,

¹ 3 Blackst. Comm. 372.

ss. 34-42, there was no mode of reviewing the decision of a court relative to the granting or refusing a new trial; and even under that statute the right to appeal from such decision is subject to some limitations; whereas, when a bill of exceptions has been brought into the Exchequer Chamber, either party, if dissatisfied with the judgment of that court upon it, has his appeal to the * House of Lords. Besides, the rule—that a party who moves to set aside a verdict on the [* 814] ground of erroneous ruling by a judge, is in the same situation with respect to relief as if he had tendered a bill of exceptions,—although useful as a general principle to guide the discretion of courts, does not hold universally. A court will often refuse a new trial, even where an undoubted error has been committed by the judge, if they think that under all the circumstances justice has been done;¹ but no such consideration could weigh with the Court of Error, which, if it deems the ruling of the inferior court erroneous, must award a venire de novo. There are other points of difference between the remedy by bill of exceptions, and that by motion for a new trial.

In criminal cases.

§ 648. 2. As to *criminal* cases. It is said that bills of exceptions do not lie here²—and they are certainly never seen in practice. But the Court of Queen's Bench will grant a new trial in certain cases of misdemeanor;³ and on one occasion it did so in a case of

¹ *Atkinson v. Pocock*, 12 Jurist, 60, and the cases there cited; *Cox v. Kitchen*, 1 Bos. & P. 338; *Wickes v. Clutterbuck*, 2 Bingh. 483; *Doe d. Welsh v. Langfield*, 16 M. & W. 497; *Mortimer v. M'Callan*, 6 Id. 58; *Bessey v. Wyndham*, 6 Q. B. 166; *Stindt v. Roberts*, 5 D. & L. 460.

² Ph. & Am. Ev. 947; 2 Ph. Evid. 541-2, 10th Ed.

³ Archb. Cr. Off. Pract. 96, 97; *R. v. Whitehouse*, 1 Dears. C. C. 1; *R. v. Russell*, 3 E. & B. 942.

felony.¹ But the propriety of this decision is questionable;² and the Privy Council, in a recent case, refused to be bound by it.³ Formerly, when the judge before whom a criminal cause was tried at the Central Criminal Court, or on circuit, &c., entertained a doubt on any point of law or evidence, he reserved [* 815] * the question for the consideration of the judges of the superior courts, who heard it argued, and if they thought the accused improperly convicted, recommended a pardon. But the judges sitting in this way had no jurisdiction as a court, and were only assessors to advise the judge by whom the matter was brought before them. By 11 & 12 Vict. c. 78, however, this was altered; and a regular tribunal, consisting of at least five of the judges of the superior courts at Westminster (including one of the Chief Justices or the Chief Baron), was constituted for the decision of all points reserved on criminal trials by any court of oyer and terminer, or jail delivery, or court of quarter sessions. But neither under the old practice nor under this statute have the parties to a criminal proceeding any *compulsory* means of reviewing the decision of the judge.

¹ *R. v. Scrafe*, 2 Den. C. C. 281.

² See the note to that case, 2 Den. C. C. 286; also *R. v. Russell*, 3 E. & B. 942, 950 per Lord Campbell, *R. v. Mawbey*, 6 T. R. 619, 638, per Lord Kenyon.

³ *Reg. v. Bertrand*, L. Rep., 1 P. C. 520.

* PART II. [* 816]

ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION
AND CROSS-EXAMINATION OF WITNESSES.

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Design of this part.

§ 649. In the preceding Part, the main object of this work was brought to a close. The final one, at which we have now arrived, will be devoted, not to law or practice, but to elementary rules for the guidance of advocates in dealing with witnesses. Much of what follows will doubtless appear very obvious to readers *experienced in such affairs, but it is not for them that this Part is intended.¹ [* 817]

¹ This part being designed solely for those whose forensic experience has either not commenced, or is very limited, we may perhaps be excused for

An objection answered.

§ 650. There is a very prevalent notion that all discussion or comment on this subject is necessarily useless, if not worse. This seems to have arisen partly from a superficial view of the matter, and partly from misapprehension of a passage in Quintilian, in which he is supposed to intimate his opinion that the faculty of interrogating witnesses with effect must be the result either of natural acuteness, or of practice. If the Roman critic [* 818] meant, what he certainly does not * express—his language being “*Naturali magis acumine, aut usu contingit hæc virtus*”—that *no* rules can be laid down for the guidance of advocates in this respect, he was most inconsistent with himself; for in the very

inserting the following judicious advice given to young advocates by some eminent foreign writers. “A young man ought to present himself with an honest assurance and plead with firmness, but with modesty in his language and demeanor. He should avoid the affectation of fetching things from too far, and should not wander from his subject. If he demands a favorable hearing, let him do it with dignity, and not in a rampant tone. He ought neither exalt himself too much, nor humble himself too much, and the less he can manage to talk about himself the better. If either the manner or matter of his discourse affords room for criticism, he should bear it patiently. The best works are subject to that; and a young man, especially, must not flatter himself with being all at once above paying this tribute, from which even those who have grown old in the career are not exempt.” *Histoire abrégée de l'Ordre des Avocats*, par M. Boucher d'Argis, ch. 11. The reader will find this in M. Dupin's work, entitled “*Profession d'Avocat,—Recueil de Pièces contenant l'Exercice de cette Profession.*” A good warning is likewise to be found in the following: “*Alii memoriæ auditorum consulturi, solis inhærebant conclusionibus, easque modo per caussarum genera, quæ vocant, modo per quæstiones disponebant; modo se præclare suo functos officio existimabant, si ad singulos titulos aliquot casuum leviter enucleatorum centurias proponerent. * * * * Illi ad memoriam omnia referebant, et si qui jejuna ista præcepta edidicerant, et ad singulas quæstiones ipsa compendii verba poterant reddere, eos aliquot casuum et quæstiuncularum myriadibus suffarcinatos, et phaleris ornatos doctoralibus, ablegabant in forum, strepitum his armis non sine horrore judicis daturus:” Heineccius, ad *Inst. Præf.* p. ix.*

chapter from which the above passage is taken,¹ he gives a series of rules for that purpose, which have been admired in every age, and are recommended by high authorities in our own law.² The present chapter is in truth chiefly founded on them, as the constant reference will show. It would indeed be strange if, while perfection in all other arts and sciences is attained by the combination of study and experience, the faculty of examining witnesses with effect,—which depends so much on knowledge of human nature, and acquaintance with the resources of falsehood and evasion, and is coeval with judicature itself,—should be destitute of all fixed principles.

“Examination,” and “cross-examination” or “examination ex adverso.”

§ 651. The terms “examination in chief” and “cross-examination” are commonly applied, respectively, to the interrogation of witnesses by the party who presents them to the tribunal and by his adversary; the legal rules of practice governing both being, as has been shown in the preceding Part,³ mainly based on the principle that every witness produced ought, in the first instance, at least, to be presumed favorably disposed toward the party by whom he is called. The very opposite is, however, often the fact; and accordingly in what follows, the term “cross-examination” will

¹ Quintil. Inst. Orat. lib. 5, cap. 7, De Testibus. Quintilian refers to the dialogues of the Socratic philosophers, and especially those of Plato, as affording good studies in the art of cross-examination. Among Plato's Divine Dialogues, see in particular the Protagoras, Second Alcibiades, Theages, and Eutyphron.

² 3 Blackst. Comm. 374; Ph. & Am. Ev. 908; 1 Greenl. Evid. § 446, Note (1), 7th Ed.

³ *Supra*, pt. 1, ch. 2, §§ 641, 642.

[* 819] *be used in the sense of "examination ex adverso:"¹ *i. e.*, the interrogation by an advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the court.

Examination of witnesses favorable to the cause of the interrogator—Examination of witnesses whose disposition toward the cause of the interrogator is unknown to him.

§ 652. In the former of these cases, *i. e.*, in the interrogation of witnesses favorable to the cause of the advocate by whom they are interrogated, the following advice is given by Quintilian, in the part of his work to which reference has been made: "Si habet testem cupidum lædendi, cavere debet hoc ipsum, ne cupiditas ejus appareat; nec statim de eo quod in judicium venit rogare, sed aliquo circuitu ad id pervenire, ut illi, quod maximè dicere voluit, videatur expressum; nec nimium instare interrogationi, ne ad omnia respondendo testis fidem suam minuat; sed in tantum evocare eum, quantum sumere ex uno satis sit."² So, when the disposition of the witness toward his cause is unknown to the advocate: "Si nesciet actor quid propositi, testis attulerit: paulatim, et (ut dicitur) pedetentim interrogando experietur animum ejus, et ad id responsum quod eliciendum erit, per gradus ducet. Sed, quia nonnunquam sunt hæ quoque testium artes, ut primò ad voluntatem respondeant, quo majore fide diversa postea dicant, est oratoris, suspectum testem dum prodest, dimittere."³ In another part of the same chapter he adds: "Illæ verò pessimæ artes, testem subornatum in subsellia ad-

¹ 1 Benth. Jud. Ev. 496 and 500.

² Id.

³ Quint. *in cap. cit.*

versarii mittere, ut inde excitatus plus noceat, vel dicendo contra reum, cum quo sederit; vel quàm adjuvisse testimonio videbitur, faciendo ex industriâ multa immodestè atque intemperanter, per quæ non à se tantùm dictis detrahat fidem, sed cæteris quoque, qui profuerant, auferat auctoritatem; quorum mentionem habui, non ut fierent, sed ud vitarentur.”

“*Cross-examination*,” or “*examination ex adverso*.”

* § 653. On the subject of “cross-examination,” or “examination ex adverso,” the fol- [* 820] lowing celebrated passages of the same author should be attentively studied.¹ “In eo qui verum invitatus dicturus est, prima felicitas interrogantis est extorquere quod is noluerit. Hoc non alio modo fieri potest, quàm longiùs interrogatione repetitâ. Respondebit enim quæ nocere causæ non arbitrabitur: ex pluribus deinde quæ confessus erit, eò perducetur, ut, quod dicere non vult, negare non possit. Nam, ut in oratione sparsa plerumque colligimus argumenta, quæ per se nihil reum aggravare videantur, congregatione deinde eorum factum convincimus; ita hujusmodi testis multa de anteactis, multa de insecutis, loco, tempore, personâ, cæterisque est interrogandus, ut in aliquod responsum incidat, post quod illi vel fateri quæ volumus, necesse sit, vel iis quæ jam dixerit repugnare. Id si non contingit, reliquum erit, ut eum nolle dicere manifestum sit: protrahendusque, ut in aliquo quod vel extra causam sit, deprehendatur: tenendus etiam diutius, ut omnia, ac plura quàm res desiderat, pro reo dicendo, suspectus judici fiat; quo non minùs nocebit, quàm si vera in reum dixisset.” * * * “Primum est, nosse testem. Nam, timidus terreri, stultus decipi, iracundus concitari,

¹ Quint. *in cap. cit.*

ambitiosus inflari, longus protrahi potest: prudens verò et constans, vel tanquam inimicus et pervicax dimittendus statim; vel non interrogatione, sed brevi interlocutione patroni refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non asperè incessere profuit; nam sæpe, qui adversùs insectantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio aut in causâ est, aut extra causam. In causâ, patronus altiùs, et unde nihil suspecti sit, repetita percontatione, priora sequentibus applicando, sæpe eò perducit homines, ut invitis quod prosit [* 821] *extorqueat. * * * Illud fortuna interdum præstat, ut aliquid quod inter se parum consentiat, à teste dicatur: interdum (quod sæpius evenit), ut testis testi diversa dicat: acuta autem interrogatio, ad hoc quod casu fieri solet, etiam ratione perducet. Extra causam, quoque, multa quæ prosint, rogari solent; de vitâ testium aliorum, de suâ quisque, si turpitudine, si humilitas, si amicitia accusatoris, si inimicitiae cum reo; in quibus aut dicant aliquid quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis interrogatio debet esse circumspecta, quia multa contra patronos venustè testis sæpe respondet, eique præcipuè vulgò favetur. Tum verbis quàm maximè ex medio sumptis, ut, qui rogatur (is autem sæpius imperitus), intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est."

Testimony false in toto — Where the fact deposed to is physically impossible.

§ 654. In dealing with examination ex adverso, we propose to consider separately the cases: 1°. Where the

evidence of the witness is false in toto. 2°. Where a portion of it is true, but a false coloring is given by the witness to the whole transaction to which he deposes — either by the suppression of some facts, or the addition of others, or both. 1. Of the former of these, the most obvious, though not the most usual case, is where the answers extracted show that the fact deposed to is physically impossible. A good instance is afforded by the case of the Comte de Morangiés.¹ “The question was, whether Monsieur de Morangiés had received a sum of 300,000 francs, for which he had given notes of hand to a person called Véron. These notes of hand he affirmed had been obtained from him fraudulently. Dujonquai, grandson of Véron, affirmed that he had himself, on foot, transported that sum to Morangiés, at his hotel, in thirteen journeys, between *seven in the morning and about one in the afternoon, making [* 822] about five hours and a half or six hours. The fact was shown to be impossible, as follows: Dujonquai said that he had divided the sum into thirteen bags, each containing six hundred louis, and twenty-three other sacks of two hundred pounds; twenty-five louis were given to Dujonquai by Morangiés. On each occasion Dujonquai put a sack of two hundred louis in each of his pockets, which, according to the fashion of the day, flapped over his thighs, and took a sack of six hundred guineas under his arm. According to the measured distance from the alley in which Dujonquai lived to the house of Morangiés, the space traversed by Dujonquai, in his thirteen journeys, would amount to five French leagues and a half; the time for each league being calculated at an hour for a person walking rather faster than usual. So far there

¹ We cite from the Law Magazine, N. S. vol. i, p. 24.

is no absolute physical impossibility, however improbable it might be that Dujonquai should not stop a moment for refreshment or repose; but, in going, Dujonquai had sixty-three steps to come down in his own house, and twenty-seven to go up at that of Morangiés, making in all ninety, multiplied by twenty-six, this amounted to two thousand three hundred and forty steps. Now it was known that to ascend the three hundred and eighty steps of Nôtre Dame, from eight to nine minutes are requisite. Thus, an hour must be deducted from the five or six during which the journeys were said to have been made. The street of St. Jacques, which Dujonquai had to ascend, is extremely steep. This would check the speed of a man laden and incumbered with bags of gold under his arm and in his pockets. The street is a great thoroughfare, especially in the morning, for three or six hours. The obstructions inevitable from this circumstance would accumulate considerably; half a league, at least, must be added to the five leagues and a half which, as the crow flies, was the distance traversed. It [* 823] *happened that on the very day which Dujonquai fixed upon for his journeys, these ordinary obstructions were increased, from the removal by sixty or eighty workmen of an enormous stone to St. G  n  vi  ve, and the crowd attracted by the spectacle. This must, even supposing him not to have yielded for a moment to the curiosity of seeing what attracted others, have added seven or eight minutes to each of his walks, which, in the twenty-six, would amount to two hours and a half. Both in his own house and that of Morangi  s it must have been necessary for Dujonquai to open and shut the doors, to take the sacks, to place them in his pockets, to take them out, to lay them before Morangi  s, who he

affirmed, contrary to all probability, counted the sacks during the intervals of his journey, and not in his presence. Time must have been requisite, also, to take and read the receipts given by the count during each journey. On his return home Dujonquai must have given them to some other person. Therefore, reckoning the time required to take and lay down the sacks, to open and shut the doors, to receive and read and deliver the acknowledgments, to conversations which Dujonquai allowed he had with several people, together with the obstacles we have mentioned, the truth of Dujonquai's statement was reduced to a physical impossibility."

Where the fact deposed to is improbable, or morally impossible.

§ 655. 2. Cases like the above are, however, necessarily uncommon; in most instances the exertions of the advocate must be directed to showing the improbability, or at most the moral impossibility, of the fact deposed. The story of Susannah and the Elders in the Apocrypha affords a very early and most admirable example. The two false witnesses were examined out of the hearing of each other; on being asked under what sort of tree the criminal act was done, the first said "a mastick tree," the other "a holm tree." The *judgment of Lord Stowell, [* 824] also, in *Evans v. Evans*,¹ shows how a supposed transaction may be disproved by its inconsistency with surrounding circumstances. "What had you for supper?" says a modern jurist.² "To the merits of the cause, the contents of the supper were in themselves altogether irrelevant and indifferent. But if, in speaking of a supper given on an important or recent occasion, six persons,

¹ 1 Hagg. Cons. Rep. 105.

² 2 Benth. Jud. Ev. 9.

all supposed to be present, give a different bill of fare; the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there." The most usual application of this is in detecting fabricated alibis. These seldom succeed, if the witnesses are skillfully cross-examined out of the hearing of each other; especially as courts and juries are aware that a false alibi is a favorite defense with guilty persons, and consequently listen with suspicion even to a true one.

Misrepresentation — Exaggeration.

§ 656. 2°. Falsehood in toto is far less common than misrepresentation. 1. Under this head comes exaggeration—the dangers of which have been pointed out in the introduction.¹ There are, however, other forms.² *E. g.*, "Question—About what thickness was the stick with which you saw Reus strike his wife Defuncta? Answer—About the thickness of a man's little finger. In truth, it was about the thickness of a man's wrist. Falsehood in this shape may be termed falsehood in *quantity*. Question—With what food did the jailer Reus feed the prisoner Defunctus? Answer—With sea biscuit, in an ordinary eatable state. In truth, the biscuit was rotten and mouldy in great part. Falsehood in this shape may be termed falsehood in *quality*."

Evasion — Generality and indistinctness — Equivocation.

§ 657. 2. Evasion. Of the various resorts of evasion [^{* 825}] the most obvious and ordinary are *generality* and *indistinctness*. "Dolus versatur in generalibus."³ "Dolus versatur in universalibus."⁴ "Mul-

¹ Pt. 1, § 26.

² 1 Benth. Jud. Ev. 141.

³ 2 Co. 34 a; 3 Co. 81 a; Wing. M. 636.

⁴ 2 Bulst. 226; 1 Rol. 157.

tiplex indistinctum parit confusionem.”¹ Untruthful witnesses, as well as unreflecting persons, commonly use words expressing complex ideas, and entangle facts with their own conclusions and inferences. *E. g.*, Question — What did A B (*i. e.*, the plaintiff, defendant, &c., as the case may be) do? or say? Answer — “He promised,” “He engaged,” “He authorized,” “He ratified,” “He confessed,” “He admitted,” “It was understood,” &c., &c., &c. The mode of detection here is to elicit by repeated questions what actually did take place, thus breaking up the complex idea into its component parts, and separating the facts from the inferences. 2. Another form is that of “equivocation,” or *verbal* truth telling — a practice much resorted to by witnesses who are regardless of their oaths; as also by others who delude themselves into the belief that deception in this shape is, in a religious and moral point of view, either not criminal, or criminal in a less degree than actual falsehood. “*Perjuri sunt qui, servatis verbis juramenti, decipiunt aures eorum qui accipiunt.*”²

Effect of interest and bias in producing untrue testimony.

§ 658. The maxim “*falsus in uno, falsus in omnibus*,”³ may be pushed too far. It must not be supposed that all the untrue testimony given in courts of justice proceeds from an intention to misstate or deceive. On the contrary, it most usually arises from interest or bias in favor of one party, which exercises on the minds of the witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which

¹ Hob. 335. See 2 Benth. Jud. Ev. 147. ² Broom's Max. xxviii. 4th Ed.

³ 3 Inst. 166.

[* 826] they depose. Again, some * witnesses have a way of compounding with their consciences — they will not state positive falsehood, but will conceal the truth, or keep back a portion of it; while others, whose principles are sound and whose testimony is true in the main, will lie deliberately when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by cross-examination is, however, pretty much the same in all cases; namely, by questioning about matters which lie at a distance, and then showing the falsehood of the direct testimony by comparing it with the facts elicited.

General observations as to the course of cross-examination.

§ 659. Although in enumerating the means by which adverse witnesses are to be encountered, Quintilian puts first,¹ “timidus (testis) terreri potest,” menacing language and austerity of demeanor are not the most efficacious weapons for this purpose; for, although there are cases in which they may be employed with advantage, still in the vast majority of instances a mendacious, an untruthful, or an evasive witness is far more effectually dealt with by keeping him in good humor with himself, and putting him off his guard with respect to the designs of his interrogator. The terror of which Quintilian here speaks must be understood with reference to a feeling of uneasiness occasioned by remorse of conscience, a sense of shame, a dread of disgrace and punishment, and a sort of undefined apprehension resulting from them all. The witness who is giving false testimony rarely knows what means the interrogator possesses of detecting and exposing him, far less those

¹ *Suprà*, § 658.

which may start up at any moment from the auditory at the trial.¹ But the hardened villain who comes into the witness box prepared to swear to unmixed falsehood, and who perseveres in that intention despite every *obstacle and every warning, is comparatively rare. On most minds the sanctions of truth: [* 827] are in continual, though it may be, silent operation; and the iniquitous design of a witness to mislead or deceive a tribunal has frequently yielded to the force of these when judiciously displayed to his mental vision. Here, and indeed in examinations *ex adverso* in general, the great art is to conceal, especially from the witness, the object with which the interrogator's questions are put. One mode of accomplishing this is by questioning the witness on different matters, in order by diverting his attention to cause him to forget the answer which it is desired to make him contradict. In a case of murder, to which the defense of insanity was set up, a medical witness called on the part of the accused swore that, in his judgment, the accused at the time he killed the deceased was affected with a homicidal mania, and urged to the act by an *irresistible* impulse. The judge, dissatisfied with this, first put to the witness some questions on other subjects, and then asked him, "Do you think the accused would have acted as he did if a policeman had been present?" to which the witness at once answered in the negative; on which the judge remarked, "your definition of irresistible impulse then must be an impulse irresistible at all times except when a policeman is present."

¹ See bk. 1, pt. 1, § 100.

² See *Intro.* pt. 1, §§ 16-20, and pt. 2, §§ 55-59.

Dangers of it.

660. But if cross-examination is a powerful engine, it is likewise an extremely dangerous one, and often recoils fearfully, even on those who know how to use it. The young advocate should reflect that if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth, that he is almost sure to recollect every *material* circumstance by which it was accompanied; and [* 328] * the more his memory is probed on the subject, the more of these circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses of *immaterial* circumstances, not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirms it. Nothing can be more suspicious than a long story, told by a number of witnesses who agree down to the minutest details. Hence it is a well-known rule that a cross-examining advocate ought not, in general, to ask questions the answers to which, if unfavorable, will be conclusive against him; as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is the man of whom he is speaking. The judicious course is to question him as to surrounding or even remote matters; his answers respecting which may show that in the testimony he gave in the first instance he either spoke falsely or was mistaken. Under certain circumstances, however, perilous questions must be risked, especially where a favorable answer would be very advantageous, and things already press so hard.

¹ Introd. pt. 1, § 16.

against the cause of the cross-examining advocate that it could scarcely be injured by an unfavorable one.

Talkative witnesses.

§ 661. The words “longus (testis) protrahi (potest)” are omitted in some copies of Quintilian, but are retained in the best editions, and have every appearance of genuineness. Their meaning is that a witness who either from self-importance, a desire to benefit the cause of the opposite party, or any other reason, displays a loquacious propensity, should be encouraged to talk, in order that he may either fall into some contradiction, or let drop something that may be serviceable to the party *interrogating. “Of this damning kind,” observes the author of a judicious pamphlet,¹ “are [* 829] witnesses who prove *too much*; for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort. He leads the witness on from one extravagant assertion in his friend’s behalf to another; and, instead of desiring him to mitigate, presses him to aggravate, his partiality, till, at last, he leaves him in the mire of some monstrous contradiction to the common sense and experi-

¹ *Suprà*, § 653.

² Hints to Witnesses in Courts of Justice, by a Barrister (Baron Field). London. 1815. We cite from the Law Mag. vol. 25, p. 361. When corporal punishment in the army excited so much interest, some time since — one party denouncing it as useless cruelty and the other insisting on it as indispensable to the government of an army — the author met an officer who warmly defended the practice, and, having first taken care to ascertain that none of his hearers had witnessed a military flogging, assured them, with great earnestness, that there was nothing in it; he had seen a soldier receive *nine hundred and fifty* lashes, and not mind it in the least. It never occurred to this zealous person that, if that were true, the usual punishments of 50, 100, or 350 lashes could not be a very effective means of enforcing military discipline.

ence of the court and jury ; and this the advocate knows will deprive his whole testimony of credit in their minds."

Course of cross-examination should be subordinate to general plan for the conduct of the cause.

§ 662. The course of cross-examination to be pursued in each particular cause should be subordinate to the plan which the advocate has formed in his mind for the conduct of it. Writers on the art of war, to which for ensic battles have so often been compared, lay down as a principle that every campaign should be conducted with some definite object in view ; or, as they express it, that no army should be without its line of operation. There is, however, this difference, that the line of operation of an army can seldom be changed after fighting has begun, whereas matters transpiring in the course of a trial frequently dis-

[* 830] close grounds of attack or defense *imperceptible at its outset; the seizing on which and adapting them to the actual state of things, requires that "ingenio veloci ac mobili, animo præsentis et acris" which Quintilian, in another place, pronounces so essential to an advocate.¹ But the analogy is very close in one respect. Like the general, the advocate should always consider whether he is the attacking or defending party, and beware of undertaking the offensive, or of assuming the burden of proof unless he is strong enough to do so. The violation of this principle is a very common, because very natural, fault in the defense of criminal cases. Oftentimes, the only chance of escape is that the proof against the accused may fall short, and all the energies of his advocate should be directed to show that it does. But if, abandoning this defensive attitude, he assumes the offensive — talks of the

¹ Quintil. Inst. Orat. lib. 6, c. 4.

accused as an innocent man, whom it is sought to oppress, denounces the prosecution as founded in spite, and the evidence by which it is supported as based on perjury, and fails, as without evidence or facts he must fail, in convincing the tribunal of this, the condemnation of his client follows as matter of course.

§ 663. The faculty of interrogating witnesses with effect is unquestionably one of the arcana of the legal profession, and, in most instances at least, can only be attained after years of forensic experience. Cross-examination, or examination *ex adverso*, is the most effective of all means for extracting truth; much perjured testimony is prevented by the dread of it; and few pleasures exceed that afforded by witnessing its successful application in the detection of guilt or the vindication of innocence. In direct examination, although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even *still more rare. For it re- [* 831] quires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull, matter of fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible and effective form. Having in the present chapter endeavored to illustrate this important subject, we cannot dismiss it without a caution. Maxims of every kind should be to us as guides—to shorten, as has been well observed, the turnings and windings of experience—not as stern masters to stifle the inspirations of genius; and the greatest advocate is he who, perfectly conversant with the established rules of his art, knows when to break them alike with safety and advantage.

* APPENDIX.

No. I.

ILLUSTRATIONS OF PRESUMPTIVE EVIDENCE IN CRIMINAL CASES.

1.

Case of William Richardson, Dumfries, A. D. 1787.

IN the autumn of 1786, a young woman, who lived with her parents in a remote district in the stewartry of Kircudbright, was one day left alone in the cottage, her parents having gone out to their harvest-field. On their return home, a little after mid-day, they found their daughter murdered, with her throat cut in the most shocking manner. The circumstances in which she was found — the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. On opening the body, the deceased appeared to have been some months gone with child; and on examining the ground about the cottage, there were discovered the footsteps, seemingly of a person who had been running hastily from the cottage, and by an indirect road, through a quagmire or bog, in which there were stepping-stones. It appeared, however,

¹ Taken from Burnett's Criminal Law of Scotland, p. 524.

that the person, in his haste and confusion, had slipped his foot, and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them; and it appeared that they were those of a person who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered, also, along the track of the footsteps, and at certain *intervals, [* 834] drops of blood; and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody. Not the slightest suspicion at this time attached to any particular person as the murderer; nor was it even suspected who might be the father of the child of which the girl was pregnant. At the funeral, a number of persons of both sexes attended; and the stewart-depute thought it the fittest opportunity of endeavoring, if possible, to discover the murderer; conceiving, rightly, that, to avoid suspicion, whoever he was, he would not, on that occasion, be absent. With this view, he called together, after the interment, the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off, and measured; and one of the shoes was found to resemble pretty nearly the impression of the footsteps hard by the cottage. The wearer of this shoe was the schoolmaster of the parish; which led immediately to a suspicion, that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination, however, of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was

rounded at that place. The measurement of the rest went on ; and after going through nearly the whole number, one at length was discovered, which corresponded exactly to the impression, in dimensions, shape of the foot, form of the sole, apparently newly mended, and the number and position of the knobs. William Richardson, the young man to whom the shoe belonged, on being asked where he was the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work ; a statement which his master and fellow-servants, who were present, confirmed. This going so far to remove suspicion, a warrant of commitment was not then granted ; but some circumstances occurring a few days thereafter having a tendency to excite it anew, the young man was apprehended and lodged in jail. On his examination, he acknowledged he was left handed ; and, some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood, a few days before. He still adhered to what he had said, of his having been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided ; but, in the course of the precognition, it turned out that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day ; that he called at a smith's shop under pretense of wanting something, which it * did not appear he had any occasion for ; that this smith's shop was in the way to the cottage [* 835] of the deceased. A young girl, who was some hundred yards from the cottage, said, that about the time the murder was committed (and which corresponded to the time that Richardson was absent from his fellow-serv-

ants), she saw a person, exactly with Richardson's dress and appearance, running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence, which would intercept him from her view, and which was the very track where the foot-steps had been traced. His fellow-servants now recollected, that, on the forenoon of that day, they were employed, with Richardson, in driving their master's carts, and when passing by a wood which they named, Richardson said that he must run to the smith's shop, and would be back in a short time. He then left his cart under their charge; and they, having waited for him about half an hour,—which one of the servants ascertained, by having at the time looked at his watch,—they remarked on his return, that he had been longer absent than he said he would. To which he replied, that he had stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle; on which they asked where he had been? He said he had stepped into a marsh, the name of which he mentioned; on which his fellow-servants remarked, "that he must have been either drunk or mad, if he had stepped into that marsh," as there was a foot-path which went along the side of it. It then appeared, by comparing the time he was absent, with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder and returned to them. A search was then made for the stockings he had worn that day. They were found concealed in the thatch of the apartment where he slept; appeared to be much soiled, and to have some drops of blood on them. The last he accounted for, by saying, first that his nose had been bleeding some

days before; but it being observed that he had worn other stockings on that day, he next said, he had assisted at bleeding a horse, when he wore those stockings; but it was proved, that he had not assisted, but had stood on that occasion at such a distance, that none of the blood could have reached him. On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining to the cottage, and which was of a very particular kind, none other of the same kind being found in that neighborhood. The shoemaker was then discovered, who had mended his shoes a short *time before; and he spoke distinctly to the shoes of the prisoner, [* 836] which were exhibited to him, as having been those he had mended. It then came out, that Richardson had been acquainted with the deceased, who was considered in the county as of weak intellect, and had on one occasion been seen with her in a wood in circumstances that led to a suspicion that he had had criminal conversation with her; and on being giped with having such connection with one in her situation, he seemed much ashamed and greatly hurt. It was proved farther, by the person who sat next to him when the shoes were measuring, that he trembled much, and seemed a good deal agitated; and that, in the interval between that time and his being apprehended, he had been advised to fly; but his answer was, "Where can I fly to?" On the other hand, evidence was brought to show that, about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased; and it was said some of that crew might have committed the murder, though their motives for doing so it was difficult to explain—it not being alleged that robbery was their

purpose, or that any thing was missed from the cottages in the neighborhood. The jury, by a great plurality of voices, found him guilty. Before his execution, he confessed he was the murderer; and said it was to hide his shame that he committed the deed, knowing that the girl was with child to him. He mentioned, also, to the clergyman who attended him, where the knife would be found with which he had perpetrated the murder. It was found accordingly in the place he described (under a stone in a wall), with marks of blood upon it.

2.

Case of Mary Ann Burdock, Bristol; A. D. 1835.

Mary Ann Burdock was tried before the Recorder of Bristol, in April, 1835, for the murder of Clara Ann Smith, on the 23rd October, 1833. The deceased, who was an elderly lady, possessed of some property, went to live with the accused, who kept a lodging-house in Bristol, and was in rather bad circumstances. On the day in question, the deceased being confined to her bed from a cold, the accused was very urgent with her to take some gruel, which she refused for some time, but at last consented. Shortly after taking it, she was seized with the symptoms of poisoning from arsenic, and died in a few hours. No medical assistance [* 837] * was procured, nor were her relatives made acquainted with her death by the accused, who caused her to be privately buried, telling the undertaker that an old lady had died in her house, who had no friends, and that she must bury her, as the things belonging to her were worth little or nothing. The interment took place on the 31st October, 1833, and nothing fur-

ther occurred until the month of December, 1834, when some circumstances, especially a change in the habits and mode of life of the accused, having excited suspicion, the body was disinterred on the 24th of that month, and found in a remarkably good state of preservation. An anatomical examination of the body, and a chemical analysis of a portion of it, which have received great praise in the medical and scientific worlds, detected the presence of arsenic; no less than four grains of the *sulphuret* having been actually procured from one portion of the intestines, while the poison in other forms was extracted from others; and the suspected party was accordingly taken into custody and brought to trial. In addition to the facts already stated, it appeared that some days before the death of the deceased the accused had purchased a quantity of the *sulphuret* of arsenic, under the groundless pretense of killing rats, and had also hired a girl to wait on the deceased, whom she especially cautioned several times to be very careful not to touch any thing after the deceased, falsely representing her as "a dirty old woman, who spat in every thing." It appeared also by the testimony of this girl that before administering the gruel to the deceased the accused brought it into an adjoining room, where she put some pinches of a *yellow* powder into it, saying to the witness that her object in this was to ease the deceased from pain, but that the witness was not to tell the deceased that there was any thing in the gruel, as if she knew there was she would not take it, and would think they were going to kill her. The accused then carefully washed her hands twice. While the deceased was in the agonies of death, moaning and rolling about in her bed, the accused, who was in the room, opened a table drawer,

took out some bits of candle and a rushlight, saying to the servant, "Only think of the old b—h having these things." This expression she repeated after the death of the deceased, on finding some other articles of small value. She cautioned the servant on leaving her house not to tell any thing of the deceased, or that she had lived with her, or that she had ever seen her, the accused, put any thing into the gruel, as people might think it curious. On this evidence Mary Ann Burdick was convicted and executed.

[* 838]

3.

Jacob. Jans, A. D. 1643.¹

The following case is inserted as illustrative of the views of the civilians, at least those of the Dutch school, on the subject of presumptive proof in criminal proceedings. It has been selected for the reason that, notwithstanding the antiquity of the case and the source whence it is taken, no evidence not receivable by the English law, as it stands at the present day, appears to have been adduced:

Quidam Suffridus Wiggeri dimicaverat cum alio, cui nomen Jacob. Jans; illo penès se non habente cultrum; Jacobus aliquoties Suffridum suo cultro impetierat; donec à circumstantibus ei culter extortus est, cum nemo Suffridum vidisset aut sciret esse percussum. Is exinde in eodem loco per integram ferè horam sederat in scamno quodam, nullà de vulnere querelâ. Deinde egressus mox rediit, pileum tenens refertum suis intestinis, nec multo post extinctus est, nullâ cum alio pugnâ rixâve habitâ. Moribundus aiebat, à Jacobo se vulneratum, & hic, ob-

¹ Huberus, Prælectiones Juris Civilis, lib. 22, tit. 3, N. 4.

jectantibus quibusdam vulnus Suffrido inflictum, responderat aliis quidem, non esse tam grave vulnus; aliàs tacuerat. Post mortem Suffridi, Jacobus accusatus, negabat factum; probabat etiam, Suffridum aliquot septimanis antè, cum apud secretum vincula femoralium solvere non posset, cultro illa diffindere conatum esse, tam imprudenter, ut parum abesset quin cultrum ventri impegisset. Hoc non erat impossibile, quo minus & tunc evenire potuisset; Curia tamen, factum peremptorium non exactè probatum adeo circumstantiis undique pressum, judicavit ut non dubitaverit, Jacobum, etsi necdum annos XX natum, omissâ questione, capitali addicere supplicio.

For further instances of convictions on purely presumptive evidence, see the cases of Richard Patch, Surrey Sp. Ass. 1806 (Report by Gurney); of F. B. Courvoisier, Sessions Papers of the Cent. Cr. Court for July, 1840; of John Tawell, Aylesbury Sp. Ass. 1845, Wills, Circ. Evid. 198, 3rd ed.; and those of W. Howe, alias Wood, id. 234; and Smith and others, id. 237; *The Commonwealth v. Webster*, Report by Bemis, Boston, 1850.

* No. II.

[* 839]

CONFESSIONS OF WITCHCRAFT.

As a specimen of the confessions of witchcraft in the 17th century, we subjoin the examinations of two of the Essex witches in 1645, which purport to have been taken before Sir Harbottell Grimston, Knt. and Baronet, one of the members of the Hon. the House of Commons, and Sir

Thomas Bowes, Knt., another of his majesty's justices of the peace for that county.¹

"The examination of Anne Cate, alias Maidenhead, of Much Holland, in the county aforesaid, at Mannintree, 9th May, 1645.

"This examinant saith that she hath four familiars, which she had from her mother about two and twenty years since; and that the names of the said imps are James, Prickeare, Robyn, and Sparrow; and that three of these imps are like mouses, and the fourth like a Sparrow, which she calls Sparrow; to whomsoever she sent the said imp Sparrow, it killed them presently; and that, first of all, she sent one of her three imps like mouses, to nip the knee of one Robert Freeman, of Little Clacton, in the county of Essex, aforesaid, whom the said imp did so lame that he died on that lameness within half a year after; that she sent the said imp Prickeare to kill the daughter of John Rawlins, of Much Holland, aforesaid, who died accordingly within a short time after; and that she sent her said imp Prickeare to the house of one John Tillet, which did suddenly kill the said Tillet; that she sent her said imp Sparrow to kill the child of one George Parby, of Much Holland, aforesaid, which child the said imp did presently kill; and that the offense this examinant took against the said George Parby, to kill his said child, was because the wife of the said Parby denied to give this examinant a pint of milk; that she sent her said imp Sparrow to the house of Samuel Ray, which, in a very short time, did kill the wife of the said Samuel; and that the cause of this examinant's malice against the said woman was, because she refused to pay to this examinant twopence, which she challenged to be due to her; and

¹ 4 How. State Trials, pp. 817, *et seq.*

that afterward her said *imp Sparrow killed the said child of the said Samuel Ray. And [* 840] this examinant confesseth that, as soon as she had received the said four imps from her said mother, the said imps spake to this examinant, and told her she must deny God and Christ, which this examinant did then assent to.”¹

The confession of Rebecca West, taken before the said justices, 21st March, 1645: “This examinant saith that, about a month since, Anne Leach, Elizabeth Gooding, Hellen Clark, Anne West, and this examinant, met altogether at the house of Elizabeth Clark, in Mannyntree, where they together spent some time in praying unto their familiars, and every one of them went to prayers; afterward some of them read in a book, the book being Elizabeth Clark’s; and this examinant saith, that forthwith their familiars appeared, and every one of them made their several propositions to those familiars, what every one of them desired to have effected; that first of all, the said Elizabeth Clark desired of her spirit that Mr. Edwards might be met withal, about the middle bridge, as he should be come riding from Eastberryhoul, in Surrey; that his horse might be scared, and he thrown down, and never rise again; that the said Elizabeth Gooding desired of her spirit that she might be avenged on Robert Tayler’s horse, for that the said Robert suspected said Elizabeth Gooding for the killing of a horse of the said Robert formerly; that the said Hellen Clark desired of her spirit that she might be revenged on two hogs in Misley-street (being the place where the said Hellen lived), one of the hogs to die presently, and the other to be taken lame; that Anne Leach desired of her spirit that a cow might be taken lame of a man’s living in Mannyntree, but

¹ 4 Howell’s State Trials, p. 856.

the name of the man this examinant cannot remember; that the said Anne West, this examinant's mother, desired of her spirit that she might be freed from all her enemies, and have no trouble. And this examinant saith, that she desired of her spirit that she might be revenged on Prudence, the wife of Thomas Hart, and that the said Prudence might be taken lame on her right side. And, lastly, this examinant saith, that, having thus done, this examinant and the other five did appoint the next meeting to be at the said Elizabeth Gooding's house, and so departed all to their own houses."¹

REX v. BEARD.

In *Rex v. Beard*, tried at the Summer Assizes in 1844, the defendant was charged with the murder of an elderly woman, the housekeeper of an old gentleman at Wednesday, who, with a man-servant, were the only other inmates. Her master went from home on a Saturday morning, about half-past nine o'clock, as he was accustomed to do on that day of the week, leaving the deceased in the house alone. Upon his return, a quarter before two, he found her dead body in the brew-house, her throat having been cut, and the house robbed. The murder had probably been committed about a quarter-past ten o'clock, as the butcher called at that time and was unable to obtain admittance, and about the same time a scream was heard. Traces were found of a man's right and left footsteps leading from a stable in a small plantation near the front of the house, from which any

¹ Id. p. 840.

person leaving the house by the front door could be seen; and similar footsteps were found at the back of the house, leading from thence across a ploughed field for a considerable distance, in a sequestered direction, until they reached a canal bank, where they were lost on the hard ground. From the distance between the steps at the back of the house, and in the ploughed field, the person whose footsteps they were must have been running; the impressions were those of right and left boots, and were very distinct, there having been snow and rain, and the ground being very moist. The right footprints had the mark of a tip round the heel; and the left footprints had the impression of a patch fastened to the sole with nails different in size from those on the sole itself; and altogether there were four different sorts of nails on the patch and soles, and in some places the nails were missing. Suspicion fell upon the prisoner, who had formerly lived as fellow-servant with the deceased, and who had been seen by several persons in the vicinity of the house a little before ten o'clock. Upon his apprehension on the following morning, his boots, trousers, shirt, and other garments were found to be stained with blood, and the trousers had been rubbed or scraped, as if to obliterate stains. The prisoner wore right and left boots, which were carefully compared with the footprints by making impressions of the soles in the soil about six inches from the original footmarks; which exactly corresponded as to the patch, the tip, and the number, shape, sizes, and arrangement of the nails. The boots were then placed lightly upon the original impressions, and here again the correspondence was exact. There could therefore be no doubt that the impressions of all these footsteps had been made by the prisoner's

boots. He had been seen about a quarter before eleven on the morning of the murder, with something bulky under his coat, near the place where the footsteps were lost on the hard ground, and proceeding thence toward the town of Wednesbury. At eleven o'clock he called at the "Pack Horse" in that place, not far from the house, where he took something to drink and immediately left, and at a little after twelve he called at another public-house, which was also near the scene of the murder, where he stayed some time smoking and drinking. In the interval between the times when the prisoner had called at these public-houses, he was seen at some distance from them, near an old whimsey; and he was subsequently seen returning in the opposite direction toward Wednesbury. Five days afterward, upon further search, the same footprints were discovered on a footpath leading in a direction from the "Pack Horse" toward the whimsey, where two bricks appeared to have been placed to stand upon, close to which was found an impression of a right foot corresponding with the impressions which had been before discovered; and in the flue was concealed a handkerchief in which were tied up a pair of trousers and waistcoat, part of the property stolen from the house. The prisoner must have availed himself of the interval between the times when he was seen at the two public-houses, to secrete the stolen garments in the whimsey, and thus to divest himself of the bulky articles which had been observed under his coat on his arrival at the "Pack Horse." The jury, after deliberating several hours, returned a verdict of guilty, and he was executed pursuant to his sentence, having previously made a confession of his guilt.

The following cases will show the extreme caution

that should be observed in the weighing of circumstantial evidence when it alone exists in a criminal case, and how uncertain and unreliable it may be when it seems to point with unerring certainty to the guilt of a certain person. Suspicious circumstances often exist, from which a person finds it impossible to free himself, and often is only relieved from it, after years of suffering, by the merest accident. On the one hand, circumstantial evidence must not be rejected with too much haste, nor upon the other hand should it be accepted with too much confidence. When no links are absent, necessary to make the chain of evidence complete, it is generally reliable; but when one or more part of a link in the chain is missing, it is generally best to reject the force of the whole.

REX v. DOWNING.

In *Rex v. Downing*, tried at the Salop Summer Assizes, 1822, Joseph Downing and Samuel Whitehouse met by appointment to shoot, and afterward to look at an estate, which, on the death of Whitehouse's wife without issue, would devolve on Downing. They arrived at the place of meeting on horseback, Downing carrying a gun-barrel and leading a colt. After the business of the day, and drinking together some hours, they set out to return home, Downing leading his colt as in the morning. Their way led through a gate opening from the turnpike road, and thence by a narrow track through a wood. On arriving at the gate Downing discovered that he had forgotten his gun-barrel, and a man who accompanied them to open the gate went back for it, returning in about three minutes. In the meantime Whitehouse had gone on in advance, and the prisoner, having received his gun-barrel, followed in the same direction. Shortly after-

ward, Whitehouse was found lying on the ground in the wood, at a part where the track widened, about six hundred yards from the gate, with his hat off, and insensible from several wounds in the head, one of which had fractured his skull. While the person by whom he was discovered went for assistance, the deceased had been turned over and robbed of his watch and money.. About the same time Downing was seen in advance of the spot where the deceased lay, proceeding homeward and leading his colt, and a few minutes afterward two men were seen following in the same direction. Suspicion attached to Downing, partly from his interest in the estate enjoyed by the deceased, and he was put upon his trial for this supposed murder, but it was clear that he had no motive on that account to kill the deceased, as the estate was not to come to him until after failure of issue of the deceased's wife, to whom he had been married several years, without having had children; so that it was his interest that the way should not be opened to a second marriage. That the deceased had been murdered at all, was a highly improbable conjecture, and it was far more probable that he had fallen from his horse and received a kick, especially as his hat bore no marks of injury, so that it had probably fallen off before the infliction of the wounds. That the deceased, if murdered at all, had been murdered by the prisoner, was in the highest degree improbable, considering how both his hands must have been employed, nor was there any evidence that the deceased had been robbed by the prisoner. It thus appeared that these accumulated circumstances, of supposed inculpatory presumption, were really irrelevant and unconnected with any *corpus delicti*. The prisoner was acquitted, and it is instructive that about twelve months afterward the mys-

tery of the robbery, the only real circumstance of suspicion, was cleared up. A man was apprehended upon offering the deceased's watch for sale, and brought to trial for the theft of it, and acquitted, the judge thinking that he ought not to be called upon at so distant a period to account for the possession of the deceased's property, which he might have purchased or otherwise fairly acquired, without being able to prove it by evidence. The accused, when no longer in danger, acknowledged that he had robbed the deceased, whom he found lying drunk on the road, as he believed; but that he had concealed the watch, on learning that it was supposed that he had been murdered, in order to prevent suspicion from attaching to himself.

REX *v.* LOOKER.

In *Rex v. Looker*, in selections from charges of Mr. Baron Alderson, the defendant was tried under the special commission for Wiltshire, in January, 1831, upon an indictment which charged him with having feloniously sent a threatening letter, which was alleged to have been written by him. That the letter was in the prisoner's handwriting was positively deposed by witnesses who had ample means of becoming acquainted with it, while the contrary was as positively deposed on the part of the prisoner by numerous witnesses equally competent to speak to the fact. But the scale appears to have been turned by the circumstance that the letter in question, and two others of the same kind to other persons, together with a scrap of paper found in the prisoner's bureau, had formed one sheet of paper; the ragged edges of the different portions exactly fitting each other, and the watermark name of the maker, which was divided into three

parts, being perfect when the portions of paper were united. The jury found the prisoner guilty, and he was sentenced to be transported for fourteen years. The judge and jury having retired for a few minutes, during their absence the prisoner's son, a youth about eighteen years of age, was brought to the table by the prisoner's attorney, and confessed that he had been the writer of the letter in question, and not his father. He then wrote on a piece of paper from memory a copy of the contents of the anonymous letter, which on comparison left no doubt of the truth of his statement. The writing was not a verbatim copy, although it differed but little, and the bad spelling of the original was repeated in the copy. The original was then handed to him, and on being desired to do so, he copied it, and the writing was exactly alike. Upon the return of the learned judge the circumstances were mentioned to him, and two days afterward the son was put upon his trial and convicted of the identical offense which had been imputed to the father. It appeared that he had access to the bureau, which was commonly left open. The writing of the letter constituted in fact the *corpus delicti*; there having been no other evidence to inculcate the prisoner as the *sender* of the letter, which would, however, have been the natural and irresistible inference if he had been the *writer*. The correspondence of the fragment of paper found in the prisoner's bureau with the letter in question, and with the two others of the same nature sent to other persons, was simply a circumstance of suspicion, but foreign, as it turned out, to the *factum* in question; and considering that other persons had access to the bureau, its weight as a circumstance of suspicion seems to have been overrated.

REX v. THORNTON.

In *Rex v. Thornton*, Wills on Circumstantial Evidence, p. 178, the defendant was tried at the Warwick Autumn Assizes, 1817, before Mr. Justice Holroyd, for the alleged murder of a young woman, who was found dead in a pit of water, about seven o'clock in the morning, with marks of violence about her person and dress, from which it was supposed that she had been violated, and afterward drowned. The deceased's bonnet and shoes and a bundle were found on the bank of the pit. Upon the grass, at the distance of forty yards, there was the impression of an extended human figure, and a large quantity of blood was upon the ground near the lower extremity of the figure, where there were also the marks of large shoe-toes. Spots of blood were traced for ten yards in a direction leading from the impression to the pit, upon a footpath, and about a foot and a half from the path upon the grass on one side of it. When the body was found, there was no trace of any footstep on the grass, which was covered with dew not otherwise disturbed than by the blood; from which circumstance it was insisted that the spots of blood must have fallen from the body while being carried in some person's arms. Upon the examination of the body, about half a pint of water and some duckweed were found in the stomach, so that the deceased must have been alive when immersed in the water. There were lacerations about the parts of generation, but nothing which might not have been caused by sexual intercourse with consent. Soon after the discovery of the body, there were found in a newly harrowed field adjoining that in which the pit was situate the recent footmarks of the right and left footsteps of the prisoner and

also of the footsteps of the deceased, which, from the length and depth of the steps, indicated that there had been running and pursuit, and that the deceased had been overtaken. From that part of the harrowed field where the deceased had been overtaken, her footsteps and those of the prisoner proceeded together, walking in a direction toward the pit and the spot where the impression was found, until the footsteps came within the distance of forty yards from the pit, when from the hardness of the ground they could be no longer traced. The marks of the prisoner's running footsteps were also discovered in a direction leading from the pit across the harrowed field; from which it was contended that he had run along in that direction after the commission of the supposed murder. The mark of a man's left shoe (but not proved to have been the prisoner's) was discovered near the edge of the pit, and it was proved that the prisoner had worn right and left shoes. On the prisoner's shirt and breeches were found stains of blood, and he acknowledged that he had had sexual intercourse with the deceased, but alleged that it had taken place with her own consent. The defense set up was an *alibi*, which, notwithstanding these apparently decisive facts, was most satisfactorily established. The prisoner and the deceased had met at a dance on the preceding evening at a public-house, which they left together about midnight. About three in the morning they were seen talking together at a stile near the spot, and about four o'clock the deceased called at the house of Mrs. Butler, at Erdington, where she had left a bundle of clothes the day before. Here she appeared in good health and spirits, changed a part of her dress for some of the garments which she had left there, and quitted the house in about a quarter of

an hour. Her way home lay across certain fields, one of which had been newly harrowed, and adjoined that in which the pit was situate. The deceased was successively seen after leaving Mrs. Butler's house by several persons, proceeding alone in a direction toward her own home, along a public road where the prisoner, if he had rejoined her, could have been seen for a considerable distance; the last of such persons saw her within a quarter of an hour afterward, that is to say, before or about half-past four. At about half-past four, and not later than twenty-five minutes before five, the accused was seen by four persons, wholly unacquainted with him, walking slowly and leisurely along a lane leading in an opposite direction from the young woman's course toward her home. About a mile from the spot where the prisoner was seen, he was seen by another witness about ten minutes before five, still walking slowly in the same direction, with whom he stopped and conversed for a quarter of an hour, after which, at twenty-five minutes past five, he was again seen walking toward his father's house, which was distant about half a mile. From Mrs. Butler's house to the pit was a distance of upward of a mile and a quarter; and allowing twenty minutes to enable the deceased to walk this distance, would bring the time of her arrival at the pit to twenty-five minutes before five; whereas the prisoner was first seen by four persons above all suspicion at half-past four or twenty-five minutes before five, and the distance of the pit from the place where he was seen was two miles and a half. Upon the hypothesis of his guilt, the prisoner must have rejoined the deceased after she left Mrs. Butler's house, and a distance of upward of three miles and a

quarter must have been traversed by him, accompanied for a portion of it by the deceased, and the pursuit, the criminal intercourse, the drowning, and the deliberate placing of the deceased's bonnet, shoes, and bundle, must have taken place within twenty or twenty-five minutes. The defense was set up at the instant of the prisoners' apprehension, which took place within a few hours after the discovery of the body, and was maintained without contradiction or variation before the coroner's inquest and the committing magistrates, and also upon the trial, and no inroad was made on the credibility of the testimony by which it was supported. The various timepieces to which the witnesses referred, and which differed much from each other, were carefully compared on the day after the occurrence, and reduced to a common standard, so that there could be no doubt of the real times as spoken to by them. Thus, it was not within the bounds of possibility that the prisoner could have committed the crime imputed to him; nevertheless public indignation was so strongly excited that his acquittal, though it afforded a fine example of the calm and unimpassioned administration of justice, occasioned great public dissatisfaction. There was, nevertheless, a total absence of all conclusive evidence of a *corpus delicti*, which the jury were required to infer from circumstances of apparent suspicion. The deceased might have drowned herself, in a moment of bitter remorse, after parting from her seducer, and excited to agonizing reflection by the sight of so many appalling marks of her ruin. It was possible that she might have sat down to change her dancing-shoes for the boots which she had worn the preceding day and carried in her bundle, and

fallen into the water from exhaustion; for she had walked to and from market in the morning, had exerted herself in dancing in the evening, and had been wandering all night in the fields without food. The allegation that the prisoner had violated the deceased, and therefore had a motive to destroy her, was mere conjecture; and from the circumstance of her having been out all night with the prisoner, with whom she was previously unacquainted, and from the state of the garments which she took off at Mrs. Butler's, as compared with those for which she exchanged them, it was clear that the sexual intercourse had taken place before she called there, at which time she made no complaint, but appeared composed and cheerful. Again, the inference contended for, from the state of the grass, with drops of blood upon it where the dew had not been disturbed, was equally groundless; for there was no proof that the dew had not been deposited after the drops of blood; and it clearly appeared that the footsteps of the prisoner and the deceased could not be traced on other parts of the grass where, beyond all doubt, they had been together in the course of the night. Now, suppose that the *alibi* had been incapable of satisfactory proof, that the prisoner had not been seen after parting from the deceased, and that the inconclusiveness of the inference suggested from the discovery of drops of blood on the grass, where there were no footmarks, had not been manifested by the absence of those marks in other places where they had unquestionably been together in the night, the guilt of the prisoner would have been considered indubitable, and his execution certain; and yet these exculpatory circumstances were entirely collateral, and independent

of the facts which were supposed to be clearly indicative of guilt.¹

REG. v. NATION.

In Taylor's Medical Journal, 269, an account is given of a trial, *Reg. v. Nation*, in which the value and force of scientific evidence was illustrated. The case was tried before Lord Chief-Justice Cockburn, upon a charge for murder, at Taunton Spring Assizes, 1857. The murder was effected by cutting the throat. A knife was found on the person of the prisoner, with stains of blood upon it; and it was contended that the murder had been effected with this weapon, while it was alleged on the part of the prisoner that it had been used for cutting raw beef. A professional analyst, called on the part of the prosecution, stated that the blood had not coagulated till it was on the knife, that the knife had been immersed in *living* blood up to the hilt, and that it was not the blood of an ox, a sheep, or a pig. His opinion was grounded upon the relative sizes of the globules of blood in man and other animals, that of man being stated to be 1-3400th of an inch, of the ox 1-5300th, of the sheep 1-5200th, and of the pig 1-4500th, the relative sizes being as 53 to 34 in the ox, 52 to 34 in the sheep, and 45 to 34 in the pig. The learned judge said, "The witness had said the blood on the knife could not be the blood of an animal as stated by the prisoner, and took upon himself to say that it was not the blood of a dead animal; that it was living blood, and that it was human blood, and

¹ The friends of the deceased brought an appeal of death, in which the defendant tendered wager of battle, and the proceedings led to the abolition, by St. 59 G. III. c. 46, of that barbarous relic of feudal times. See *Ashford v. Thornton*, 4 B. & Ald. 405; Short-hand Rep., and Observations upon the case of Abraham Thornton, by Edward Holroyd, Esq., where the judge's notes of the evidence are given.

he had shown them the marvellous powers of the modern microscope. At the same time, admitting the great advantages of science, they were coming to great niceties indeed when they speculated upon things almost beyond perception, and he would advise the jury not to convict on this scientific speculation alone." The case was conclusive on the general evidence.

REX. v. BOOTH.

In *Rex v. Booth*, Warwick Assizes, 1808, the defendant was tried for the murder of his brother, who resided with their father, and overlooked his farm. The prisoner, who lived about twenty miles from his father's house, went on a visit to him, and on the day after his arrival his brother was found dead in the stable, not far from a vicious mare, with her traces upon his arm and shoulders. Two other horses were in the stable, but they had their traces on. Suspicion fell upon the prisoner, who was on ill terms with his brother, and the question was whether the deceased had been killed with a spade, or by kicks from the mare. The spade was bloody, but it had been inadvertently used by a boy in cleaning the stable, and the cause of death could only be determined by the character of the wounds. There were two straight incised wounds on the left side of the head, one about five and the other about two inches long, which had apparently been inflicted by an obtuse instrument. On the right side of the head there were three irregular wounds, two of them about four inches in length, partaking of the appearance both of lacerated and incised wounds. There was also a wound on the back part of the head, about two inches and a half long. There was no tumefaction around any of the wounds, the integuments adhering

firmly to the bones; and, except where the wounds were inflicted, the fracture of the skull was general throughout the right side, and extended along the back of the head toward the left side, and a small part of the temporal bone came away. The deceased was found with his hat on, which was bruised, but not cut, and there were no wounds on any other part of the body. Two surgeons expressed a positive opinion that the wounds could not have been inflicted by kicks from a horse, grounding that opinion principally on the distinctness of the wounds, the absence of contusion, the firm adherence of the integuments, and the straight lateral direction and the similarity of the wounds; whereas, as they stated, the deceased would have fallen from the first blow if he had been standing, and if lying down, the wounds would have been perpendicular; and, moreover, they were of opinion that the wounds could not have been inflicted if the hat had been on the deceased's head without cutting the hat, and that he could not have put on his hat after receiving any of the wounds. The learned judge, however, stated that he remembered a trial at the Old Bailey where it had been proved that a cut and a fracture had been received without having cut the hat, and evidence was adduced of the infliction of a similar wound by a kick without cutting the hat. The prisoner was acquitted.

REG. v. MORTON.

In *Reg. v. Morton*, Salop Spring Assizes, 1850, the defendant, who was tried for the murder of her mother, had lived for nine or ten years as housekeeper to an elderly gentleman, who was paralyzed and helpless, the only other inmate being another female servant, who slept on a sofa in his bedroom to attend upon him. The

deceased occasionally visited her daughter at her master's house, and sometime stopped all night, sleeping on a sofa in the kitchen. She came to see her daughter about eight o'clock one night, in December, 1848. The other servant retired to bed about half-past nine, leaving the prisoner and her mother in the kitchen, and she afterward heard the prisoner close the door at the foot of the stairs, which was usually left open that they might hear their master if he wanted assistance. About two o'clock in the morning she was aroused by the smell of fire, and a sense of suffocation, and found the bedroom full of smoke; upon which she ran down stairs, the door at the bottom of which was still closed. As she went down stairs she saw a light in the yard, and she found the kitchen full of smoke and very wet, particularly near the fireplace, as also was the sofa, but there was very little fire in the grate. She then unfastened the front door, and ran out to fetch her master's nephew, who lived near, and who, after ascertaining that his uncle was safe, went into the kitchen, and threw some water on the sofa, which was on fire. The prisoner then drank to intoxication from a bottle of rum, and laid herself down on the sofa. The pillows and entire back part of the sofa-cover were burnt to the breadth of the shoulders. The remains of the deceased were found lying across the steps of the brew-house, and on the back of the head lay a piece of the sofa-cover, and near the body was a cotton bag, besmeared with oil, which had been used indiscriminately as a bag or pillow. Near the feet of the body there were four pairs of sheets, which had been in the kitchen the night before, wet and almost entirely consumed. The prisoner's clothes were on a chair in the kitchen, and it appeared from the state of the bed-clothes that she had not been in bed. A

butter-boat, which had been full of dripping, and a pint bottle, which had been nearly full of lamp-oil, and left near the fire over night, were both empty, and there were spots of grease and oil on the pillow-case, sheets, and sofa. A stocking had been hung up to cover a crevice in the window-shutter, through which any person outside might have seen into the kitchen. The door-post of the kitchen leading into the yard was much burnt about three feet high from the ground; and there was a mark of burning on the door-post of the brew-house. The surface of the body was completely charred, the tongue was livid and swollen, and one of the toes was much bruised, as if it had been trodden on. There was a small blister on the inner side of the right leg, far below where the great burning commenced, which contained straw-colored *serum*, but there was no other blister on any part of the body, nor any marks of redness around the blister, or at the parts where the injured and uninjured tissues joined. The nose, which had been a very prominent organ during life, was flattened down so as not to rise more than the eighth of an inch above the level of the face, and as it never recovered its original appearance, it was stated that it must have been so flattened for some time before death. The lungs and brain were much congested, and a quantity of black blood was found in the right auricle of the heart. From these facts the medical witnesses examined in support of the prosecution concluded that the deceased had been first suffocated by pressing something over her mouth and nostrils so forcibly as to break and flatten the nose in the way described; but they had made no examination of the larynx and trachea, and other parts of the body. A physician, who had heard the evidence but not seen

the deceased, gave his opinion that the appearances described by the other witnesses were signs of death by suffocation; that the absence of vesication and of the line of redness were certain signs that the body had been burnt after death; but he added that, as there were no marks of external injury, an examination should have been made of the parts of the body above mentioned, in order to arrive at a satisfactory conclusion. Another medical witness thought it possible that suffocation might have been produced by the flames preventing the access of air to the lungs, while others again thought it impossible that such could have been the case, as no screams had been heard in the night, and they were also of opinion that if alive the deceased must have been in such intense agony that she could not, if she had been strong enough to walk from the kitchen to the brew-house, have refrained from screaming. One of these witnesses stated that he did not think it possible that the deceased, if alive, could have fallen in the position in which she was found, as her first impulse would have been to stretch out her arms to prevent a fall; but, on the other hand, it was urged that it was not possible to judge of the acts of a person in the last agonies of death by the conduct of one in full life. Under the will of her grandfather the prisoner was entitled, in expectancy on the demise of her mother, to the sum of £200, and to the interest of the sum of £300, for her life. She had frequently cruelly beaten the old woman, threatened to shorten her days, bitterly reproached her for keeping her out of her property by living so long, and declared that she should never be happy so long as she was above ground, and she had once attempted to choke her by forcing a handkerchief down her throat, but was pre-

vented from doing so by the other servant. The magistrates had been frequently appealed to, but they could only remonstrate, as the old woman would not appear against her unnatural daughter. The case set up on behalf of the prisoner was, that she was in bed, and perceiving a smell of fire, came down stairs, and finding the sofa on fire, fetched water and extinguished it, and that she knew nothing of her mother's death until she heard of it from others. It appeared that the old woman was generally very chilly, and in the habit of getting near the fire; that on two former occasions she had burned portions of her dress; that on another she had burned the corner of the sofa-cushion; that she used to smoke in bed, and light her pipe with lucifer matches, which she carried in a basket; and that on the night in question she had brought her pipe, which was found on the following morning in her basket. It was urged as the probable explanation of the position in which the body was found, that, finding herself on fire, she must have proceeded to the brew-house, where she knew there was water, and leaned in her way there against the door-post, and that, feeling cold in the night, she had wrapped the sheets around her, and did not throw them off until she reached the yard. The prisoner, though accustomed to sleep up stairs, was in the habit of undressing in the kitchen, which was stated to be the reason why the stocking had been so placed as to prevent any person from seeing into the kitchen. Mr. Justice Patteson, in his charge to the jury, characterized the evidence of the medical practitioners who had examined the body as extremely unsatisfactory in consequence of the incompleteness of their examination; the opinion of the physician who had not seen the body was also, he said, very

unsatisfactory, as substituting him for the jury; that he had only expressed his opinion as founded upon the facts stated by the other witnesses; that if he had seen the body himself, his views might have been materially different; that the other witnesses might have omitted to mention particulars which he might deem of the greatest importance, but on which they looked as of no significance; that, therefore, opinions expressed on such partial statements ought to be received with the greatest reluctance and suspicion; that he had always had a strong opinion against such evidence, as tending to encroach upon the proper duty of juries; and he recommended them to exercise their own judgment upon the other evidence in the case, without yielding it implicitly to the authority of this witness. The jury acquitted the prisoner.

In cases of death by poison, where a person is charged with its criminal administration, many nice questions arise, and, as illustrative of them, the following cases are given:

REX v. DONELLAN.

In *Rex v. Donellan*, which was tried at Warwick Spring Assizes, 1781, before Mr. Justice Butler, for the murder of Sir Theodosius Boughton, his brother-in-law, a young man of fortune, twenty years of age, who up to the moment of his death had been in good health and spirits, with the exception of a trifling venereal ailment, for which he occasionally took a laxative draught. Mrs. Donellan was the sister of the deceased, and together with Lady Boughton, his mother, lived with him at Lawford Hall, the family mansion. On attaining twenty-one, Sir Theodosius would have been entitled absolutely to an estate of £2,000 per annum, the greater part of

which, in the event of his dying under that age, would have descended to the prisoner's wife. For some time before the death of Sir Theodosius, the prisoner had on several occasions falsely represented his health to be very bad, and his life to be precarious, and not worth a year's purchase, though to all appearance he was well and in good health. On the 29th of August the apothecary in attendance sent him a mild and harmless draught, to be taken the next morning. In the evening the deceased was out fishing, and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which representations were false. When he was called on the following morning, he was in good health, and about seven o'clock his mother went to his chamber for the purpose of giving him his draught, of the smell and nauseousness of which he immediately complained, and she remarked that it smelt like bitter almonds. In about two minutes he struggled very much, as if to keep the medicine down, and Lady Boughton observed a gurgling in his stomach. In ten minutes he seemed inclined to doze, but in five minutes afterward she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the draught he died. Lady Boughton ran down stairs to give orders to a servant to go for the apothecary, who lived about three miles distant, and in less than five minutes the prisoner came into the bedroom, and after she had given him an account of the manner in which Sir Theodosius had been taken, he asked where the physic bottle was, and she showed him two bottles. The prisoner then took up one of them and said, "is this it?" and being answered "yes," he poured some water out of the water bottle, which was near, into

the phial, shook it, and then emptied it into some dirty water, which was in a wash-hand basin. Lady Boughton said, "you should not meddle with the bottle," upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger to it and tasted it. Lady Boughton again asked what he was about, and said he ought not to meddle with the bottles, on which he replied he did it to taste it, though he had not tasted the first bottle. The prisoner ordered a servant to take away the basin, the dirty things, and the bottles, and put the bottles into her hands for that purpose. She put them down again on being directed by Lady Boughton to do so, but subsequently, while Lady Boughton's back was turned, removed them on the peremptory order of the prisoner. On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening, fishing, and had taken cold, but he said nothing of the draught which he had taken. The prisoner had a still in his own room, which he had used for distilling roses, and a few days after the death of Sir Theodosius he brought it, full of wet lime, to one of the servants, to be cleaned. The prisoner made several false and inconsistent statements to the servants and others as to the cause of the young man's death, attributing it at one time to his having been out late, fishing, and getting his feet wet, and at another to the bursting of a blood vessel, and again to the malady for which he was under treatment, and the medicine given to him. On the day of his death he wrote to Sir William Wheeler, his guardian, to inform him of the event, but made no reference to its suddenness. The coffin was soldered up on the fourth day after the death. Two days afterward, Sir William, in consequence of the

rumors which had reached him of the manner of his friend's death, and that suspicions were entertained that he had died from the effects of poison, wrote a letter to the prisoner, requesting that an examination might take place, and mentioning the gentlemen by whom he wished it to be conducted. He accordingly sent for them, but did not exhibit Sir William Wheeler's letter, alluding to the suspicion that the deceased had been poisoned, nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the case to be one of ordinary sudden death, and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination, on the ground that it might be attended with personal danger. On the following day a medical man, who had heard of their refusal to examine the body, offered to do so, but the prisoner declined his offer on the ground that he had not been directed to send for him. On the same day the prisoner wrote to Sir William a letter, in which he stated that the medical men had fully satisfied the family, and endeavored to account for the event by the ailment under which the deceased had been suffering, but he did not state that they had not made the examination. Three or four days afterward, Sir William, having been informed that the body had not been examined, wrote to the prisoner insisting that it should be done, which, however, he prevented by various disingenuous contrivances, and the body was interred without examination. In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death. Putrefaction was found to be far advanced; and the head was not opened, nor the bowels examined, and in other respects

the examination was incomplete. When Lady Boughton, in giving evidence before the coroner's inquest, related the circumstance of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve, and endeavor to check her; and he afterward told her that she had no occasion to have mentioned that circumstance, but only to answer such questions as were put to her; and in a letter to the coroner and jury, he endeavored to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish. Experiments made by the administration of laurel-water on various animals produced convulsions and sudden death, and on opening one of them a strong smell of laurel-water was perceived. Upon the trial, four medical men, three physicians and an apothecary, were examined on the part of the prosecution, and expressed a very decided opinion, mainly grounded upon the symptoms, the suddenness of the death, the *post-mortem* appearances, the smell of the draught as observed by Lady Boughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel-water; and one of them stated that, on opening the body, he had been affected with a peculiar biting acrimonious taste in the hands and mouth, like that which affected him in all the subsequent experiments with laurel-water. An eminent surgeon and anatomist examined on the part of the prisoner, stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned, and that the appearances presented upon dissection explained nothing but putrefaction.

Mr. Justice Buller, in his charge to the jury, called

their attention to the suddenness of the death immediately after the administration of a draught by the prisoner, to the opinions of the medical witnesses that there was nothing to lead them to attribute death to any other cause than that draught, to the prisoner's misrepresentations as to the deceased's state of health at a time when he appeared to others to be in good health and spirits, to his contrivances to prevent the examination of the body, and emphatically to the fact of his having rinsed out the bottle from which the draught had been taken, "which," said the learned judge, "does carry with it strong marks of knowledge by him that there was something in that bottle which he wished should never be discovered;" and finally, to his attempts to check the witness who spoke to that circumstance while giving her evidence before the coroner. The prisoner was convicted and executed.

REX v. DONNALL.

In *Rex v. Donnall*, the defendant, who was a surgeon and apothecary, was tried at Launceston Spring Assizes, 1817, before Mr. Justice Abbott, for the murder of Mrs. Elizabeth Downing, his mother-in-law.

The prisoner and the deceased were next-door neighbors, and lived upon friendly terms; and there was no suggestion of malice, nor could any motive be assigned which could have induced the prisoner to commit such an act, except that he was in somewhat straitened circumstances, and in the event of his mother-in-law's death would have become entitled to a share of her property. On the 19th of October the deceased drank tea at the prisoner's house, which was handed to her by him, and returned home much indisposed, retching and vomiting, with a violent cramp in her legs, from which she did not

recover for several days. About a fortnight afterward, after returning from church, and dining at home on boiled rabbits smothered with onions, upon the invitation of her daughter, she drank tea in the evening at the prisoner's house, with a family party. The prisoner on this occasion also handed to the deceased cocoa and bread and butter, proceeding toward her chair by a circuitous route; but it was stated to have been his habit to serve his visitors himself, and not to allow them to rise from their chairs. When Mrs. Downing had drunk about half of her second cup, she complained of sickness and went home, where she was seized with retching and vomiting, attended with frequent cramps; and then a violent purging took place, and at eight o'clock the next morning she died. None of the other persons who had been present on either of these occasions were taken ill. To a physician called in by the prisoner two or three hours before her death, he stated that she had had an attack of *cholera morbus*. The nervous coat of the stomach was found to be partially inflamed or stellated in several places, and the villous coat was softened by the action of some corrosive substance; the blood-vessels of the stomach were turgid, and the intestines, particularly near the stomach, inflamed. The contents of the stomach were placed in a jug, in a room to which the prisoner (to whom at that time no suspicion attached) had access, for examination, but he clandestinely threw them into another vessel containing a quantity of water. The prisoner proposed that the body should be interred on the following Wednesday, assigning as a reason for so early an interment that from the state of the corpse there would be danger from keeping it longer. This representation was entirely untrue. He also evinced

much eagerness to accelerate the funeral, urging the person who had the charge of it, and the men who were employed in making the vault, to unusual exertions. The physician called in to the deceased concluded, from the symptoms, the shortness of the illness, and the morbid appearances, that she had died from the effect of some active poison; and in order to discover the particular poison supposed to have been used, he applied to the contents of the stomach the tests of the ammoniacal sulphate of copper, or common blue vitriol, and the ammoniacal nitrate of silver, or lunar caustic, in solution, which severally yielded the characteristic appearances of arsenic, the sulphate of copper producing a green precipitate, whereas a blue precipitate is formed if no arsenic is present, and the nitrate of silver producing a yellow precipitate, instead of a white precipitate, resulting if no arsenic is present. He stated that he considered these tests conclusive and infallible, and that he had used them because they would detect a minuter portion of arsenic; on which account he considered them to be more proper for the occasion, as, from the smallness of the quantity, from the frequent vomitings and purgings, and the appearances of the tests, he found there could not be much. Concluding that bile had been taken into the stomach, he mixed some bile with water, and applied to the mixture the same tests, but found no indication of the presence of arsenic; from which he inferred that the presence of bile would not alter the conclusion which he had previously drawn. Having been informed that the deceased had eaten onions, he boiled some in water; and after pouring off the water in which they were boiled, he poured boiling water over them, and left them standing for some time, after which he applied the same tests to

the solution thus procured, and ascertained that it did not produce the characteristic appearances of arsenic. The witness, upon his cross-examination, admitted that the symptoms and appearances were such as might have been occasioned by some other cause than poisoning; that the reduction test would have been infallible; and that it might have been adopted in the first instance, and might also have been tried upon the matter which had been used for the other experiments. Upon his re-examination he accounted for his omission of the reduction test by stating that the quantity of matter left after the frequent vomitings and the other experiments would have been too small, and that it would not have been so correct to use the matter which had been subjected to the preceding experiments.

Several medical witnesses called on the part of the prisoner stated that the symptoms and morbid appearances, though they were such as might and did commonly denote poisoning, did not exclude the possibility that death might have been occasioned by *cholera morbus* or some other disease; that the tests which had been resorted to were fallacious, since they had produced the same characteristic appearances upon their application to innocent matter, namely, the sulphate of copper a green, and the nitrate of silver a yellow precipitate, on being applied to an infusion of onions; and that the experiment with the bile was also fallacious, since, from the presence of phosphoric acid, which is contained in all the fluids of the human body, the same colored precipitate would be thrown down by putting lunar caustic into a solution of phosphate of soda. The learned judge, in his charge to the jury, said that none of the evidence of the witnesses for the prisoner went to show that the tests employed by

the medical witnesses on the other side would not prove that arsenic was there if it were really there; that the experiments made by the witnesses for the prisoner were made with onions in a different state from what onions boiled with rabbits are, as by that mode could be got a great portion of the juice or strength of the onions, in water, whereas in regard to onions prepared for the table, or boiled with a considerable quantity of water, a good portion of their juice is withdrawn from them; that as to the experiment with the bile, if there were no phosphoric acid in the stomach of the deceased, or no quantity of it sufficient to produce that appearance, whatever might have been the appearance if sufficient were put in, then the experiment was tried on something that did not contain a sufficient quantity of that matter; that although the same result might be produced by that matter if there, yet if there is no reason to suppose that that matter was there, or there in sufficient quantity, then he thought the suspicion that arsenic was there was very strong. His Lordship also said, "If the evidence as to the opinions of the learned persons who have been examined on both sides should lead you to doubt whether you should attribute the death of the deceased to arsenic having been administered to her, or to the disease called *cholera morbus*, then as to this question as well as to the other question the conduct of the prisoner is most material to be taken into consideration; for he, being a medical man, could not be ignorant of many things as to which ignorance might be shown in other persons; he could hardly be ignorant of the proper mode of treating *cholera morbus*; he could not be ignorant, that an early burial was not necessary; and when an operation was to be performed in order to discover the cause of the death,

he should not have shown a backwardness to acquiesce in it; and when it was performing, and he attending, he could not surely be ignorant that it was material for the purposes of the investigation that the contents of the stomach should be preserved for minute examination.”¹ His Lordship also said, “The conduct of the prisoner, his eagerness in causing the body to be put into a shell, and afterward to be speedily interred, was a circumstance most material for their consideration, with reference to both the questions he had stated; for although the examination of the body in the way set forth, and the experiments that were made, might not lead to a certain conclusion as to the charge stated, that the deceased got her death by poison administered to her by the prisoner, yet if the prisoner, as a medical man, had been so wicked as to administer that poison, he must have known that the examination of the body would divulge it.”² Notwithstanding this adverse charge of the learned judge, the prisoner was acquitted.

REG. v. BLANCY.

In *Regina v. Blancy*, tried in 1844, the defendant, who was a medical man, was tried for the murder of his wife, by the administration of prussic acid. They left their place of residence at Sunderland, on a journey of pleasure to London, where they arrived on the 4th of June, and went into lodgings. On the morning of the 8th, being the Saturday after their arrival in town, the prisoner rang the bell for some hot water, a tumbler, and a spoon, and he and his wife were heard conversing in their chamber. About a quarter before eight he called

¹ Frazer's Short-hand Rep. 161.

² Frazer's Short-hand Rep. 170.

the landlady upstairs, saying that his wife was very ill, and she found her lying motionless on the bed, with her eyes shut and her teeth closed, and foaming at the mouth. The prisoner said she had had fits before, but none like this, and that she would not come out of it; and on being urged to send for a doctor, he said he was a doctor himself, and should have let blood before, but that there was no pulse, and that this was an affection of the heart, and that her mother died in the same way nine months before, and he put her feet and hands in warm water, and applied a mustard plaster to her chest. In the meantime a medical man was sent for, but she died before his arrival. There was a tumbler close to the head of the bed, about one-third full of a clear white fluid, and an empty tumbler on the other side of the table, and a paper of Epsom salts. In reply to a question from the medical man, the prisoner stated that the deceased had taken nothing but a little salts. On the same morning he ordered a grave for interment on the Tuesday following. The contents of the stomach were found to contain prussic acid and Epsom salts, and it was deposed that the symptoms were similar to those of death by prussic acid, but they might be the effect of any powerful sedative poison, and that the means resorted to by the prisoner were not likely to promote recovery, but that artificial respiration and stimulants were the appropriate remedies, and might probably have been effectual. The prisoner had purchased prussic acid and acetate of morphine on the previous day from a vendor of medicines with whom he was intimate, and he had been in the habit of using these poisons, under advice, for a complaint in the stomach. Two days after the fatal event, he stated to the medical man who had been called in, that on the morning in

question he was about to take some prussic acid; that on endeavoring to remove the stopper he had some difficulty, and used some force with the handle of a tooth-brush; that the neck of the bottle was broken by the force, and some of the acid spilt; that he placed the remainder in the tumbler, and went into the front room to fetch a bottle in which to place the acid, but instead of doing so, began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bed-room; that he immediately went to her; that she exclaimed that she had taken some hot drink, and called for cold water, and that the prussic acid was undoubtedly the cause of her death. Upon being asked what he had done with the bottle, he said he had destroyed it, and assigned as the reason why he had not mentioned the circumstances before, that he was distressed and ashamed at the consequences of his negligence. According to the opinions of the medical witnesses, after the scream or shriek, volition and sensibility must have ceased, and speech would have been impossible. To various persons in the north of England the prisoner wrote false accounts of his wife's state of health. In one of them, dated from the Euston Hotel, the 6th of June, he stated that she was unwell, and had two medical gentlemen attending her, and that he was apprehensive of a miscarriage. In another, dated the 8th, he stated that he had had her removed to private lodgings, where she was under the care of two medical men, dangerously ill; that symptoms of premature labor had come on, and that one of the medical men pronounced her heart to be diseased. At the date of this letter his wife was cheerful and well, and all these statements respecting her health were false, and in fact they had gone into lodgings on their arrival in

London on the 4th. In a letter, dated the 9th, he stated the fact of her death, but without any allusion to the cause of it; which suppression, in a subsequent letter, he stated to have been caused by the desire of concealing the shame and reproach of his negligence. His statement to his landlady that his mother-in-law had died from disease of the heart was a falsehood, he himself having certified to the registrar of burials that bilious fever was the cause of her death. The deceased was entitled to some leasehold property, to which the prisoner would become entitled absolutely if he survived her, and to a copyhold estate which was limited to the joint use of herself and her husband, so that the survivor would take the absolute interest. The motive suggested for the commission of the alleged murder was, that the prisoner might become at once the absolute owner of his wife's property.

Mr. Baron Gurney said that this case differed from almost every other case he had ever known, in this circumstance, that generally there was a difficulty in ascertaining whether the death had been caused by poison, and whether the poison came from the hands of the person charged with the crime; but that in this case there could be no doubt that the deceased had come to her death by a poison most certain, fatal, and speedy in its effects, and that it was equally certain that it came from the hands of the prisoner. It had been proved beyond all doubt that the prisoner had bought the poison, and had placed or left it unprotected in the chamber of his wife, and the question was, whether, she having died from poison, it had been administered to her by his hand, or whether he had purposely placed it in her way in order that she might herself take it. The secrets of all hearts were known to God alone, and human tribu-

nals could only judge of those secrets from the conduct of the individual at the time. In this case, the jury had the conduct of the prisoner, his words, his writing, his demeanor, proved before them, and it would be for them to decide, upon the whole case, whether they believed he had administered the poison, or placed it within the reach of the deceased in order that she might take it. If he had done either of those things, he would be guilty of murder; if they thought he had acted incautiously and negligently by leaving the poison in the way he had done, he had not been guilty of murder. He dwelt upon the circumstances that the parties had lived for one year and a half together upon terms of mutual affection, that the marriage took place with the consent of the lady's mother, with whom they had lived till her death, that the visit to London was well known to their friends, and that the place to which she was taken was where he had lodged before, and near the residence of the only two persons with whom he was acquainted in London. When any person committed a heinous crime it was usual and natural, said the learned judge, to look whether there existed any adequate motive to the commission of it. The prisoner being about thirty, and his wife about twenty-two years of age, it would be a good deal to say that the desire to possess her property should be brought forward as a great motive of interest to excite to the commission of such a crime. Nevertheless, it was sometimes found, as they could not dive into the heart and ascertain motives, that a grave crime might be committed, although no motive for it could be found. Inasmuch as the great question the jury had to decide was the intention of the prisoner, it should be remembered that a man was entitled to a candid construction of his words

and actions, particularly if placed in circumstances of great and unexpected difficulty, and they would take care to give what fair allowance they could in putting a construction upon the prisoner's words and actions. He also laid stress upon the conduct of the prisoner to his wife, and his general good character for kindness. He could not conceive the motive which should have induced the prisoner, in the letter posted on the 6th, when his wife was well and cheerful, to write so complete a fabrication, from beginning to end, of her being unwell and attended by two medical men, and the jury would observe that it was written on the very day on which the prisoner had made arrangements for her residence with a friend, during his absence abroad. When the letter of the 8th was written did not appear, but it was proved to have been posted on the evening of that day. If it was written before the death, it told against the prisoner. It concurred with the letter written on the 6th, and practiced the same deception, as to the two medical men, upon those to whom it was addressed. The defense was, that the prisoner had been guilty of a lamentable indiscretion; that a sudden event, fatal to his wife, had happened; that he was overpowered and overwhelmed by the result of his own carelessness, and that he did not like to divulge the truth. The awkward fact, however, was, that in his last letter he had pursued exactly the same system as that adopted in the letter written two days before. They would recollect, with reference to the letter of the 8th, that on that day he had more than once exclaimed, "This is all my fault." These outbreaks were of some importance for the consideration of the jury in giving, as compared with the letters, all indulgent consideration to any language used by the prisoner, after an event had occurred

which placed him in a situation of difficulty and embarrassment. In comparing the statement set up for the defense with the evidence of the medical witnesses, two things were of a good deal of importance. The prisoner's statement was, that when he entered the bed-chamber, his wife told him what had occurred, and that he took the tumbler out of her hand. The medical men had told the jury that with the scream that had been spoken of, all volition and power of speech would cease; but here it must not be forgotten that the judgment of these gentlemen must be received with this caution, that none of them had ever witnessed the effect of prussic acid on the human frame. It was for the jury to decide whether they were convinced, beyond any reasonable doubt, that the prisoner either administered, or in effect caused to be administered, poison to the deceased; if on the other hand they should be of opinion that he had been merely guilty of indiscretion, and that, in consequence of the sudden and awful event which had occurred, he had been driven to conceal it by falsehood, they would acquit him. No doubt, falsehood often placed persons having recourse to it under awkward and menacing circumstances. In this case, falsehood had been much resorted to. It was shown before the death, in the statement about the two medical men; that falsehood was followed up and repeated in the second letter; another falsehood appeared in the representation that his mother-in-law, who had died of bilious fever, as appeared by an entry in the register under his own hand, had died of disease of the heart. If they thought the case conclusive, however painful it might be, it would be their duty to pronounce the prisoner guilty; but if they thought it left in doubt and mystery, so that they could

not safely proceed, they would remember that it was better that many guilty men should escape than that one innocent man should perish. The prisoner was acquitted.

REX v. PALMER.

In *Rex v. Palmer*, Short-hand Rep. 308, the prisoner had been a medical practitioner, but had given up his profession for the pursuits of the turf, in the course of which he became intimate with a young man named Cook, who was addicted to the same pursuits. By his extensive gambling transactions he became involved in great pecuniary difficulties, and was ultimately driven to the desperate expedient of borrowing money at exorbitant rates of interest, and to the commission of forgeries on a large scale. In 1855 he was indebted in about £20,000, borrowed at sixty per cent interest upon bills, all of which bore the forged acceptance of his mother, and secured in part by the assignment of a policy of assurance for £13,000 on the life of his brother, who died in August of that year. To this source the prisoner had looked for relief from his embarrassments, but the office having become acquainted with circumstances which induced them to dispute the validity of the policy on the ground of fraud, declined to pay the sum assured, and in consequence the holder of some of these bills issued writs against the prisoner and his mother, which was sent into the country, to be served unless he should effect some satisfactory arrangement. Exposure, ruin and punishment thus became imminent, unless some means could be devised of averting the impending disclosures. On the 13th of November Cook won, by one of his horses and by bets at Shrewsbury races, between £2,000 and £3,000, of which he received £700 or £800 on the course. The remain-

der was payable in London, on Monday, the 20th. He was greatly excited by his success, and the prisoner and several other persons spent the following evening with him, after the conclusion of the races, at his inn in Shrewsbury. In the course of the evening the prisoner was seen in the passage outside of his own room, holding up a tumbler to a gaslight; after which he went, with the tumbler in his hand, into the room where Cook and his other friends were sitting. Soon afterward, on drinking some brandy and water, Cook became suddenly ill, with violent vomiting, and it was necessary to call in medical assistance. He said he had been dosed by the prisoner, and handed the money he had about him, between £700 and £800, to a friend to take care of, who returned it to him the next morning, after his recovery. Notwithstanding these suspicious circumstances, such was the prisoner's influence over his infatuated victim, that Cook returned from Shrewsbury to Rugeley in company with him on the evening of Thursday, the 15th, when on their arrival the former went to his lodgings at the Talbot Arms, and the prisoner to his own house opposite. On the Saturday and Sunday the prisoner called many times to see Cook, who was repeatedly taken sick and ill after taking coffee and broth from the hands of the prisoner. On Monday (the 18th) he got up much better, and the prisoner called upon him early in the morning, but did not see him again until eight and nine in the evening, having in the interim, as it turned out, been to London. In the course of that evening, Cook's medical attendant, who had previously seen him, left at the Talbot Arms a box of morphine pills, which was taken into his bedroom and administered by the prisoner, soon after which the household was disturbed by screams

proceeding from the patient's room, who was found sitting up in bed, in great agony, beating the bedclothes, gasping for breath, convulsed with a jerking and twitching motion all over his body, and one hand clenched and stiff, but conscious, and calling to those about him to send for the prisoner. In about half an hour the paroxysm subsided, and he became composed. On the morning of Tuesday (the 19th), after taking coffee from the hand of the prisoner, Cook was again afflicted with violent vomiting, which continued throughout the day; but in the evening was better, and in good spirits. About seven o'clock he was visited by his medical attendant, and the prisoner urged him to repeat the morphine pills, as on the night before; and they went together to the surgery, where pills were prepared and delivered to the prisoner, who took them away, and went to Cook's room about eleven o'clock, as was intended and supposed, for the purpose of administering them to him; so that he had the opportunity in the interval of changing them, which there can be no doubt he did. Cook strongly objected to take them, because he had been made so ill the night before; but his objections were overcome by the prisoner, and at length he swallowed the pills presented to him. Soon after midnight he became ill with the same agonizing symptoms as on the preceding night, and again desired that the prisoner should be sent for. Such was the rigidity of his limbs that it was found impossible to raise him up, and he asked to be turned over on his side; after which the action of the heart gradually ceased, and in a quarter of an hour he was a corpse. When dead, the body was bent back like a bow, and if it had been placed upon a level surface it would have rested upon the head and heels.

Upon receiving information of the young man's death, his step-father, who lived in London, went to Rugeley on Friday, the 23d, to make arrangements for his funeral, and to inquire into the state of his affairs, as well as into the circumstances of his illness. On stating to the prisoner that he understood he knew something of his affairs, he told him that there were £4,000 worth of bills of the deceased's out, to which his name was attached, and that he had got a paper drawn up by a lawyer, signed by the deceased, to show that he had never received any benefit from them. The step-father then inquired if there were no sporting debts owing to him, to which the prisoner said there was nothing of the sort; and on asking about the betting book, which could not be found, the prisoner said it would be of no use if found, as when a man dies his bets are done with. Other facts now began to transpire throwing a sinister light upon the mysterious events of the last few days. It was discovered that the prisoner had procured three grains of strychnia on the evening of Monday, and a second quantity of six grains on the following day; that he had been seen to search the pockets, and under the pillow and bolster of the unfortunate man before his body was cold; that although his betting book was kept on the dressing table of the deceased's bedroom, and was seen there on the previous night, it was never seen after his death; that the prisoner handed to a friend of the deceased five guineas as the whole of the money that was found belonging to him; that he had been to London on Monday, the day before the death, and procured payment of upward of £1,000 on account of the wagers won by the deceased at Shrewsbury, and appropriated the amount in payment of his own losses, and in part payment of the forged accept-

ances on which writs had been issued; that before the races he was short of money, and had borrowed £25, add lost largely at the races, but had subsequently paid considerable sums to various other creditors; that two or three days after Cook's death he had endeavored to obtain the attestation by an attorney to a forged acknowledgment in the name of the deceased that £4,000 of bills had been negotiated by the prisoner for his benefit, and finally had prevailed upon the medical man who had attended the deceased, who was of a very advanced age, to certify that he had died of apoplexy. A *post-mortem* examination was made, at which the prisoner was present, and the stomach and intestines were placed in a jar to be taken to London for examination. While the operation was going on, the prisoner pushed against the medical men engaged in it, so as to shake a portion of the contents of the stomach into the body. The jar was then covered with parchment, tied down, and sealed and placed aside; and while the attention of the medical men was still engaged in examining the body, the prisoner removed the jar to a distance near a door not the usual way out of the room, and it was found that two slits had been cut with a knife through the double skin which formed the covering. The prisoner having learned that the jar was to be sent to London the same evening, offered the driver who was to carry the persons in charge of it to the railway station, £10 to upset the carriage and break the jar. The analytical chemists to whom the stomach and intestines, and subsequently other parts of the body were sent, found traces of antimony, but none of strychnia, or any other poison; and sent their report by post, directed to the attorney at Rugeley employed in the investigation. The prisoner incited the postmaster

to betray to him the contents of this report; and wrote a confidential letter to the coroner, to whom during the course of the inquiry he sent presents of fish and game, stating that he had seen it in black and white that no strychnia, prussic acid, or opium had been found, and expressing his hope that on the next day to which the inquest stood adjourned, the verdict would be that of death from natural causes. The coroner's jury found a verdict of willful murder against the prisoner. Upon the trial the chemical witnesses examined on the part of the prosecution stated that the stomach and intestines were received in an unfavorable state for finding strychnia had it been there, the stomach having been cut from end to end, and the contents gone, and the mucous surface, in which any poison, if present, would be found, lying in contact with the intestines and their succulent contents, and shaken together; that the non-discovery of strychnia was not conclusive that death had not been caused by that poison, inasmuch as they had failed to discover it in animals killed for the purpose of experiment; that if a minimum dose is administered, it disappears by absorption into the blood, but that it is discoverable, and had been discovered, when administered to animals in excess of the quantity required to destroy life, and that there is no known process by which it can be discovered in the tissues, if present there only in a small quantity. On the other hand, witnesses were called on behalf of the prisoner, who disputed the theory of absorption, and stated that strychnia, if present, is always discoverable, not only in the blood and in the stomach and intestines, and their contents, but also in the tissue; that there was nothing in the condition of the parts of the body submitted to examination, to preclude the detection of

strychnia ; and that if present, it might have been found, even if it had been administered in a minimum dose, though on this latter point there was some difference of opinion among them. Numerous medical witnesses of the highest professional experience and character, called on the part of the Crown, deposed that many of the symptoms, especially in the progress and termination of the attack, were not those of any of the ordinary forms of tetanus, idiopathic or traumatic, or of any known disease of the human frame, but were the peculiar characteristics of poisoning by strychnia. Nor were there in these respects any such differences between their opinions and those of many respectable professional witnesses called on the part of the prisoner, as might not be accounted for by the imperfect state of knowledge of all the forms of tetanic affection, or by the obscurities of physiological and pathological science. Of the numerous professional witnesses examined on behalf of the prisoner, some ascribed the symptoms to tetanic affection ; others of them to various forms of disease from which they were shown to be clearly distinguishable ; while others again ascribed them to physical causes absolutely absurd and incredible. The contradictions and inconsistencies in the testimony of some of the prisoner's witnesses, and their obtrusive zeal and manifest purpose of obtaining an acquittal, deprived it of all moral effect, and drew down upon several of them the severe reprehension of the court. After a protracted trial of twelve days, the prisoner was found guilty, and was executed pursuant to his sentence.

COMMONWEALTH v. JOHN W. WEBSTER.

5 Cush. (Mass.) 295.

This case involves so many questions of practical importance, in the law of evidence, particularly so far as relates to the form and effect of circumstantial evidence, to establish a crime, that I have deemed it advisable to give the case entire. The charge of Chief Justice Shaw is replete with legal learning, and is really in all respects a model charge, and is of great value to the profession.

The defendant, professor of chemistry, in the medical college in Boston, attached to the university at Cambridge, was indicted in the municipal court at the January term, 1850, for the murder of Dr. George Parkman at Boston, on the 23d of November, 1849. The defendant was tried before the chief justice, and Justices Wilde, Dewey and Metcalf.

The indictment contained four counts, the first of which alleged the crime to have been committed by stabbing with a knife, the second by a blow on the head with a hammer; and the third by striking, kicking, beating, and throwing on the ground. The fourth count was as follows: "That the said John W. Webster, at Boston aforesaid, in the county aforesaid, in a certain building, known as the medical college, there situate, on the 23d day of November last past, in and upon the said George Parkman, feloniously, willfully, and of his malice aforethought, did make an assault; and him, the said George Parkman, in some way and manner, and by some means, instruments, and weapons, to the jurors unknown, did then and there feloniously, willfully, and of malice aforethought, deprive of life; so that he, the said George

Parkman, then and there died ; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said John W. Webster, him, the said George Parkman, in the manner and by the means aforesaid, to them the said jurors unknown, then and there, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the commonwealth aforesaid, and contrary to the form of the statute in such case made and provided."

The case was conducted, on the part of the commonwealth, by J. H. Clifford, attorney-general, with whom, at his request, and by leave of the court, was associated G. Bemis ; and for the defendant, by P. Merrick and E. D. Sohier, who, at the request of the defendant, were assigned as his counsel.

When the court were proceeding to impanel the jury, the defendant's counsel moved that the statute questions as to the disqualifications of the jurors be put to them before the defendant should be called upon to exercise his right of challenge. But the court decided that if the defendant intended to challenge peremptorily, he must exercise that right before the jurors were interrogated as to their bias or opinions.

On examining the jurors, according to the provisions of the Revised Statutes, chap. 95, § 27, Shaw, C. J., said, in substance, that the material inquiries contemplated by the statute, as applicable to this case, were, whether the juror had formed or expressed an opinion, or was sensible of any bias or prejudice in regard thereto. The word "prejudice" seemed to imply nearly the same thing as "opinion ;" a *pre-judgment* of the case, and not necessarily an enmity or ill-will against either party. The statute intended to exclude any person who had made up his

mind, or formed a judgment in advance, in favor of either side. Yet the opinion or judgment must be something more than a vague impression, formed from casual conversations with others, or from reading imperfect, abbreviated, newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence. If one had formed what in some sense might be called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror.

The question was then put in this form: "Have you expressed, or have you formed, any opinion upon the subject-matter now to be tried, or are you sensible of any bias or prejudice therein?"

One of the jurors, after having been asked this question, and also whether he had any such opinions as would preclude him from finding a defendant guilty of an offense punishable with death, in reply to the latter inquiry, said that he was opposed to capital punishment, but that he did not think that his opinions would interfere with his doing his duty as a juror; that as a legislator he should be in favor of altering the law, but he believed that he could execute it as a juror, as it was. The court intimated to the juror that he must decide for himself whether the state of his opinion was such as would prevent his giving an unbiased verdict; that as he had stated it, the court did not consider him disqualified, and he was accordingly sworn. When this juror was called to take his seat upon the panel, after all the other jurors had been sworn, he stated to the court that he thought it inconsistent for him to serve as a juror, holding the opinions he did, and should prefer being left

off; that he thought he could give an unbiased verdict; yet he had a sympathy for the prisoner and his family, and feared that his opinions in relation to capital punishment might influence others of the jury. The court ruled that his case did not come within the statute, and declined to excuse him.

The attorney-general, after opening the case, suggested that it would be desirable that the jury should be permitted to go to the medical college, and take a view of the premises where the murder was alleged to have been committed. The court said that they had no doubt of their authority to grant a view, if they deemed one expedient (Revised Statutes, chap. 137, § 10); and that views had been granted of late in several capital cases in this county. And the court afterward, on adjourning for the day, directed that the jury should be permitted to take a view of the medical college on the next morning, before the coming in of the court, attended by two officers, and one counsel on each side.

In reply to an inquiry by the counsel for the commonwealth, before beginning to examine their witnesses, the court directed, that each witness should be fully examined to the extent of his knowledge upon all points of inquiry; and should not be examined in part only at one stage, with a view to being recalled on other points, at a later stage of the trial.

The government introduced evidence, that Dr. George Parkman, quite peculiar in person and manners, and very well known to most persons in the city of Boston, left his home in Walnut street in Boston in the forenoon of the 23d of November, 1849, in good health and spirits; and that he was traced through various streets of the city until about a quarter before two o'clock of that

day, when he was seen going toward and about to enter the medical college: That he did not return to his home: That on the next day a very active, particular, and extended search was commenced in Boston and the neighboring towns and cities, and continued until the 30th of November; and that large rewards were offered for information about Dr. Parkman: That on the 30th and 31st of November, certain parts of a human body were discovered, in and about the defendant's laboratory in the medical college; and a great number of fragments of human bones and certain blocks of mineral teeth, imbedded in slag and cinders, together with small quantities of gold, which had been melted, were found in an assay furnace of the laboratory: That in consequence of some of these discoveries the defendant was arrested on the evening of the 30th of November: That the parts of a human body so found resembled in every respect the corresponding portions of the body of Dr. Parkman, and that among them all there were no duplicate parts; and that they were not the remains of a body which had been dissected: That the artificial teeth found in the furnace were made for Dr. Parkman by a dentist in Boston in 1846, and refitted to his mouth by the same dentist a fortnight before his disappearance: That the defendant was indebted to Dr. Parkman on certain notes, and was pressed by him for payment; that the defendant had said that on the 23d of November, about nine o'clock in the morning, he left word at Dr. Parkman's house, that if he would come to the medical college at half past one o'clock on that day, he would pay him; and that, as he said, he accordingly had an interview with Dr. Parkman at half past one o'clock on that day, at his laboratory in the medical college: That the

defendant then had no means of paying, and that the notes were afterward found in his possession.

The government called N. D. Gould as a witness, who testified as follows: "I am a resident of this city, and have been, for many years. I know the prisoner, and have known him for a long time, by sight, but I have no personal acquaintance with him. I have never seen him write, but have seen what I suppose to be his handwriting. I am familiar with his signature. I have seen it appended, together with those of the other medical professors, to the diplomas given by the medical college, for twenty years. I have had occasion to take notice of it there, from having been employed as a penman, to fill out those diplomas for the college. I have paid particular attention to the subject of penmanship, having practiced it in every way, and instructed in it, for some fifty years. I have published on the subject."

The government then produced three several anonymous letters, addressed to the city-marshal of Boston, which had been dropped in the post-offices at Boston and East Cambridge, between the time of the disappearance of the deceased and the arrest of the prisoner, and in which various suggestions were thrown out, calculated to divert suspicion from the medical college; and proposed to ask the witness to state, in whose handwriting the letters were, or by whom they were written.

The defendant's counsel objected to the question, on the ground, that the letters did not purport to be in the defendant's handwriting, and that the evidence was inadmissible to show that this writing, in a disguised hand, and not in imitation of another person's, was made by the defendant.

The attorney-general referred to *Moody v. Rowell*, 17 Pick. 490; *Rex v. Cator*, 4 Esp. 117.

Shaw, C. J. The witness was asked whether he had a personal knowledge of the defendant's handwriting; and stated that he had. His experience qualifies him to say this. Papers have passed under his notice, in a business or official capacity, which have given him a long and familiar acquaintance with the defendant's handwriting. He seems, therefore, competent to give an opinion in regard to it, independent of any skill of his own as a penman, or as a judge of penmanship.

In regard to the term "handwriting," we think that it should include, generally, whatever the party has written with his hand, and not merely his common and usual style of chirography. This question of proof of handwriting most commonly arises and is discussed in cases of forgery. But there are other cases, in which the evidence of experts is applied to handwriting; as, in prosecutions for threatening letters, or for arson. There the question is generally made, that they are not genuine, on the part of the person purporting to send them, but simulated and disguised; and the proof shows that the writer did not seek to imitate a hand, but to depart, as far as possible, from his own. The evidence has always been considered admissible in these instances.

The witness then testified that he thought the letters were in the defendant's handwriting, and was permitted by the court, against the objection of defendant's counsel, to state his reasons for his opinion.

He further testified that, in his opinion, one of the letters, as well as an erasure on the envelope of one of the others, could not have been written with a pen, or done with a brush.

The counsel for the commonwealth then produced a small pine stick, about six inches long, and as large as a goose quill, and having a small wad of cotton which had been dipped in ink wound round one end and tied on with a string; which instrument was proved to have been found in defendant's laboratory. And the witness was asked, whether the erasure on the inside of the envelope was made with this instrument; or how it was made.

The defendant's counsel objected.

Shaw, C. J. We think the witness' opinion quite inadmissible. The fact, that such an instrument was found, has already been proved; but opinion, as to its possible use, would be liable to great objection.

The defendant's counsel contended, that the fourth count of the indictment did not describe the offense alleged therein fully and plainly, substantially and formally, and was insufficient; and that the mode of pleading adopted would give rise to great confusion, contravene many established rules, and lead to an indefinite multiplication of issues; Mass. Const. Part I, Art. XII.; Hawk. P. C., B. 2, c. 23, § 84; East, P. C. c. 5, § 107; 3 Chit. Crim. L. 734; 1 Russ. Cr. 557; *Rex v. Kelly*, Moody, C. C. 113; *Rex v. Thompson*, id. 139; *Rex v. Martin*, 5 Car. & P. 128; and that this case was distinguishable from *People v. Colt*, 3 Hill, 432, in which the allegation was, that the defendant murdered the deceased by means of striking and cutting him with some instrument to the jury unknown; for there the means were alleged, namely, striking and cutting, and the instrument only (which is immaterial), was laid as unknown. And, to show the rules by which circumstantial evidence must

be governed, they cited 1 Stark. Ev. (5th Am. ed.) 446, 447 ; Best on Presump. 282 ; Wills, Circ. Ev. 187.

Much evidence was introduced on the part of the defendant to prove that his general character and reputation was that of a peaceable and humane man.

Several witnesses, called for the defense, testified that they saw Dr. Parkman at various places in Boston, at different times between the hours of a quarter before two and five, in the afternoon of the 23d of November.

The attorney-general, in rebutting the evidence for the defendant, proposed to call witnesses to show that there was a person about the streets of Boston, at the time of Dr. Parkman's disappearance, who bore a strong resemblance to him, in form, gait and manner ; so strong that he was approached and spoken to as Dr. Parkman, by persons well acquainted with the latter. The court excluded the evidence, remarking that perhaps there might be no objection to the introduction of the very person supposed to be Dr. Parkman, but that this testimony of other persons, as to the resemblance of an unknown stranger, was quite too remote and unsatisfactory.

The opinion of the court on the law of the case was given in the charge to the jury as follows :

Shaw, C. J. Homicide, of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term, in its largest sense, is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful or unlawful ; it is lawful when done in lawful war upon an enemy in battle ; it is lawful when done by an officer in the execution of justice upon a criminal, pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-

defense. But it is not necessary to dwell on these distinctions; it will be sufficient to ask attention to the two species of criminal homicide, familiarly known as murder and manslaughter.

In seeking for the sources of our law upon this subject, it is proper to say, that whilst the statute law of the commonwealth declares (Rev. Sts. c. 125, § 1), that "Every person who shall commit the crime of murder shall suffer the punishment of death for the same;" yet it nowhere defines the crimes of murder or manslaughter, with all their minute and carefully-considered distinctions and qualifications. For these, we resort to that great repository of rules, principles, and forms, the common law. This we commonly designate as the common law of England; but it might now be properly called the common law of Massachusetts. It was adopted when our ancestors first settled here, by general consent. It was adopted and confirmed by an early act of the provincial government, and was formally confirmed by the provision of the constitution (ch. 6, art. 6), declaring that all the laws which had theretofore been adopted, used, and approved, in the province or state of Massachusetts bay, and usually practiced on in the courts of law, should still remain and be in full force until altered or repealed by the legislature. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law, and have not been altered and modified by acts of the colonial or provincial government or by the state legislature, they have the same force and effect as laws formally enacted.

By the existing law, as adopted and practiced on, unlawful homicide is distinguished into murder and manslaughter.

Murder, in the sense in which it is now understood, is the killing of any person in the peace of the commonwealth, with *malice aforethought*, either express or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will toward one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances, as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offense; or involuntary, as when the death of another is caused by some unlawful act, not accompanied by any intention to take life.

From these two definitions, it will be at once perceived, that the characteristic distinction between murder and manslaughter is malice, express or implied. It therefore becomes necessary, in every case of homicide proved, and in order to an intelligent inquiry into the legal character of the act, to ascertain with some precision the nature of legal malice, and what evidence is requisite to establish its existence.

Upon this subject, the rule as deduced from the authorities is, that the implication of malice arises in

every case of intentional homicide; and, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, and the circumstances attending it. If there are, in fact, circumstances of justification, excuse, or palliation such proof will naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts. Therefore, when one person assails another violently with a dangerous weapon, likely to kill and which does in fact destroy the life of the party assailed, the natural presumption is, that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, the consequence follows, that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice. On the other hand, if death, though willfully intended, was inflicted immediately after provocation given by the deceased, supposing that such provocation consisted of a blow or an assault, or other provocation on his part, which the law deems adequate to excite sudden and angry passion and create heat of blood, the fact rebuts the presumption of malice; but still, the homicide being unlawful, because a man is

bound to curb his passions, is criminal, and is manslaughter.

In considering what is regarded as such adequate provocation, it is a settled rule of law, that no provocation by words only, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter. Therefore, if, upon provoking language given, the party immediately revenges himself by the use of a dangerous and deadly weapon likely to cause death, such as a pistol discharged at the person, a heavy bludgeon, an axe, or a knife; if death ensues, it is a homicide not mitigated to manslaughter by the circumstances, and so is homicide by malice aforethought, within the true definition of murder. It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words "malice aforethought," in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design, in contradistinction to accident and mischance.

In speaking of the use of a dangerous weapon, and the mode of using it upon the person of another, I have spoken of it as indicating an intention to kill him, or *do him great bodily harm*. The reason is this: Where a man, without justification or excuse, causes the death of another by the intentional use of a dangerous weapon likely to destroy life, he is responsible for the consequences, upon the principle already stated, that he is liable for the natural and probable consequences of his

act. Suppose, therefore, for the purpose of revenge, one fires a pistol at another, regardless of consequences, intending to kill, maim, or grievously wound him, as the case may be, without any definite intention to take his life; yet, if that is the result, the law attributes the same consequences to homicide so committed, as if done under an actual and declared purpose to take the life of the party assailed.

I propose to verify and illustrate these positions, by reading a few passages from a work of good authority on this subject, a work already cited at the bar, East's Pleas of the Crown, c. 5, §§ 2, 4, 12, 19, 20.

“Murder is the voluntary killing of any person of malice prepense or aforethought, either express or implied by law; the sense of which word *malice* is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief. And therefore malice is implied from any deliberate, cruel act against another, however sudden.” § 2.

“Manslaughter is principally distinguishable from murder in this: that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionally lenient.” § 4.

“The implication of malice arises in every instance of homicide amounting, in point of law, to murder; and in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him.” § 12.

“Whenever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder.” § 19.

“Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are contemptuous or insulting actions or gestures, without an assault upon the person, nor is any trespass against lands or goods. This rule governs every case, where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill, or to do some great bodily harm. But if he had given the other a box on the ear, or had struck him with a stick, or other weapon *not likely to kill*, and had unluckily and against his intention killed him, it had been but manslaughter.” § 20.

The true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death

ensues, it is regarded as done through heat of blood or violence of anger, and not through malice, or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion, or passion of malice.

The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat. And if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in heat of blood; and though not excusable, because a man is bound to control his angry passions, yet it is not the higher offense of murder.

We have stated these distinctions, not because there is much evidence in the present case which calls for their application, but that the jury may have a clear and distinct view of the leading principles in the law of homicide. There seems to have been little evidence in the present case that the parties had a contest. There is some evidence tending to show the previous existence of angry feelings; but unless these feelings resulted in angry words, and words were followed by blows, there would be no proof of heat of blood in mutual combat, or under provocation of an assault, on the one side or the other; and the proof of the defendant's declarations, as to the circumstances under which the parties met and parted, as far as they go, repel the supposition of such a contest.

With these views of the law of homicide, we will proceed to the further consideration of the present case. The

prisoner at the bar is charged with the willful murder of Dr. George Parkman. This charge divides itself into two principal questions, to be resolved by the proof: first, whether the party alleged to have been murdered came to his death by an act of violence inflicted by any person; and if so, secondly, whether the act was committed by the accused.

Under the first head we are to inquire and ascertain, whether the party alleged to have been slain is actually dead; and, if so, whether the evidence is such as to exclude, beyond reasonable doubt, the supposition that such death was occasioned by accident or suicide, and to show that it must have been the result of an act of violence.

When the dead body of a person is found, whose life seems to have been destroyed by violence, three questions naturally arise. Did he destroy his own life? Was his death caused by accident? Or was it caused by violence inflicted on him by others? In most instances, there are facts and circumstances surrounding the case, which, taken in connection with the age, character and relations of the deceased, will put this beyond doubt. It is with a view to this, and in consequence of the high value which the law places upon the life of every individual under its protection, that provision is made for a prompt inquiry into such cases, prior to any question of guilt or innocence. The high and anxious regard of the law, for the protection and security of the life of the subject, pervades its whole system; and that upon the principles of simple humanity, without reference to the condition or circumstances of individuals. Indeed, you must have perceived, from the whole course of this trial, the extreme tenderness of the law for the rights of human life; as well the

life of the deceased, whose death is the subject of this trial as that of the prisoner, whose own life is put in jeopardy by it. Hence, in case of a sudden and violent death, a coroner's inquest is provided, in order to an inquiry into its true cause, whilst the facts are recent, and the circumstances unchanged. If, on such an inquiry, made by an officer appointed for the purpose, and by a jury acting upon evidence given on oath, it satisfactorily appears that the deceased came to his death by accident or a visitation of providence, the result will have a strong tendency to allay unjustifiable suspicion, and to satisfy and tranquilize the feelings of the vicinity and of the community at large, always deeply interested in such an event. But if, as in the present case, the result of such an early inquiry tends to fasten suspicion on any individual as the guilty cause, then it naturally leads to other proceedings which may vindicate the law, and bring the suspected party to trial, and, if found guilty, to punishment.

The importance of this inquiry into the circumstances of a supposed violent death, and of collecting and preserving the proofs of them, will appear from the further consideration of the present case. It is one where the first important and leading fact, proved by uncontested evidence, is, that the person alleged to have been slain, Dr. Parkman, suddenly disappeared from his family and home on Friday, the 23d of November last, without any cause known to them, and was never afterward seen. The theory upon which the prosecution is founded, and to establish which, evidence has been laid before you, is, that he was deprived of life in the afternoon of the day mentioned, under such circumstances as lead to a strong

belief, that his death was caused by an act of violence and by human agency.

This case is to be proved, if proved at all, by circumstantial evidence; because it is not suggested that any direct evidence can be given, or that any witness can be called to give direct testimony upon the main fact of the killing. It becomes important, therefore, to state what circumstantial evidence is; to point out the distinction between that and positive or direct evidence; and to give some idea of the mode in which a judicial investigation is to be pursued by the aid of circumstantial evidence.

The distinction, then, between direct and circumstantial evidence is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and of course that no one can be called to testify to it; is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act, in relation to their most important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is, therefore, necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and, thanks to a beneficent providence, the laws of nature and the relations of things to each other are so linked and combined together, that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

On this subject, I will once more ask attention to a remark in the work already cited, *East's Pleas of the Crown*, c. 5, § 11. "Perhaps," he says, "strong circumstantial evidence, in cases of crimes like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offense may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous."

Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disad-

vantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood.

But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question that, in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

From this view, it is manifest, that great care and caution ought to be used in drawing inferences from proved facts. It must be a fair and natural, and not a forced or artificial conclusion; as when a house is found

to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the persons who broke open the house plundered the property. It has sometimes been enacted by positive law, that certain facts proved shall be held to be evidence of another fact; as where it is provided by statute, that if the mother of a bastard child gives no notice of its expected birth and is delivered in secret, and afterward is found with the child dead, it shall be presumed that it was born alive, and that she killed it. This is a forced and not a natural presumption, prescribed by positive law, and not conformable to the rule of the common law. The common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It is not sufficient that it is probable only; it must be reasonably and morally certain.

The next consideration is, that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence. I say, every fact necessary to the conclusion; because it may and often does happen, that, in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary, to the conclusion sought to be proved, but to show that they are consistent with it and not repugnant, and go to rebut any contrary presumption. As in the present case, it was testified by a witness, that, the day before the alleged homicide, he saw Dr. Parkman riding through Cambridge and inquiring for Dr. Webster's house; this evidence had a slight tendency to show, that he was then urgently pressing his

claim; but not being necessary to the establishment of the main fact, if the witness was mistaken in the time or in the fact itself, such failure of proof would not prevent the inference from other facts, if of themselves sufficient to warrant it. The failure of such proof does not destroy the chain of evidence; it only fails to give it that particular corroboration, which the fact, if proved, might afford.

So to take another instance arising out of the evidence in the present case. The fact of the identity of the body of the deceased with that of the dead body, parts of which were found at the medical college, is a material fact, necessary to be established by the proof. Some evidence has been offered, tending to show, that the shape, size, height, and other particulars respecting the body, parts of which were found and put together, would correspond with those of the deceased. But, inasmuch as these particulars would also correspond with those of many other persons in the community, the proof would be equivocal and fail in the character of conclusiveness upon the point of identity. But other evidence was then offered, respecting certain teeth found in the furnace, designed to show that they were the identical teeth prepared and fitted for Dr. Parkman. Now, if this latter fact is satisfactorily proved, and if it is further proved to a reasonable certainty, that the limbs found in the vault and the burnt remains found in the furnace were parts of one and the same dead body, this would be a coincidence of a conclusive nature to prove the point sought to be established; namely, the fact of identity. Why, then, it may be asked, is the evidence of height, shape, and figure of the remains found, given at all? The answer is, because it is proof of a fact not repugnant

to that of identity, but consistent with it, and may tend to rebut any presumption that the remains were those of any other person; and therefore, to some extent, aid the proof of identification. The conclusion must rest upon a basis of facts proved, and must be the fair and reasonable conclusion from all such facts taken together.

The relations and coincidences of facts with each other, from which reasonable inferences may be drawn, are some of a physical or mechanical, and others of a moral nature. Of the former, some are so decisive as to leave no doubt; as where human footprints are found on the snow (to use an illustration already adduced), the conclusion is certain, that a person has passed there; because we know, by experience, that that is the mode in which such footprints are made. A man is found dead, with a dagger-wound in his breast; this being the fact proved, the conclusion is, that his death was caused by that wound, because we know that it is an adequate cause of death, and no other cause is apparent.

We may also take an instance or two from actual trials. A recent case occurred in this court, where one was indicted for murder by stabbing the deceased in the heart, with a dirk knife. There was evidence tending to show that the prisoner had possession of such a knife on the day of the homicide. On the next morning, the handle of a knife, with a small portion of the blade remaining, was found in an open cellar, near the spot. Afterward, upon the *post-mortem* examination of the deceased, the blade of a knife was found broken in his heart, causing a wound in its nature mortal. Some of the witnesses testified to the identity of the handle, as that of the knife previously in the possession of the accused. No one, probably, could testify to the identity of the blade. The

question, therefore, still remained, whether that blade belonged to that handle. Now, when these pieces came to be placed together, the toothed edges of the fracture so exactly fitted each other, that no person could doubt that they had belonged together; because, from the known qualities of steel, two knives could not have been broken in such a manner as to produce edges that would so precisely match.

So, an instance is mentioned of a trial before Lord Eldon, when a common-law judge, where the charge was of murder with a pistol. There was much evidence tending to show that the accused was near the place at the time, and raising strong suspicions that he was the person who fired the pistol; but it fell short of being conclusive, of fastening the charge upon the accused. The surgeon had stated in his testimony, that the pistol must have been fired near the body, because the body was blackened, and the wad found in the wound. It was asked by the judge, if he had preserved that wad; he said he had, but had not examined it. On being requested to do so, he unrolled it carefully, and on an examination it was found to consist of paper, constituting part of a printed ballad; and the corresponding part of the same ballad, as shown by the texture of the paper and the purport and form of stanza of the two portions, was found in the pocket of the accused. This tended to identify the defendant as the person who loaded and fired the pistol.

These are cases where the conclusion is drawn from known relations and coincidences of a physical character. But there are those of moral nature, from which conclusions may as legitimately be drawn. The ordinary feelings, passions, and propensities under which parties act, are facts known by observation and experience; and they

are so uniform in their operation, that a conclusion may be safely drawn, that if a person acts in a particular manner he does so under the influence of a particular motive. Indeed, this is the only mode in which a large class of crimes can be proved. I mean crimes which consist not merely in the act done, but in the motive and intent with which they are done. But this intent is a secret of the heart, which can only be directly known to the searcher of all hearts; and if the accused makes no declaration on the subject, and chooses to keep his own secret, which he is likely to do if his purposes are criminal, such criminal intent may be inferred, and often is safely inferred, from his conduct and external acts.

A few other general remarks occur to me upon the subject, which I will submit to your consideration. Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.

To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion, without just cause, on other persons; all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently, because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case often mentioned in the books, and cited here yesterday, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive, afterward, proved conclusively that he was not guilty of the murder.

One other general remark on the subject of circumstantial evidence is this: That inferences drawn from independent sources, different from each other, but tending to the same conclusion, not only support each other, but do so with an increased weight. To illustrate this, suppose the case just mentioned of the wad of a pistol consisting of part of a ballad, the other part being in the pocket of the accused. It is not absolutely conclusive that the accused loaded and wadded the pistol himself. He might have picked up the piece of paper in the street. But suppose that by another and independent witness it were proved that that individual purchased such a ballad at his shop, and further, from another witness, that he

purchased such a pistol at another shop. Here are circumstances from different and independent sources bearing upon the same conclusion, to wit: that the accused loaded and used the pistol, and they, therefore, have an increased weight in establishing the proof of the fact.

I will conclude what I have to say on this subject by a reference to a few obvious and well-established rules, suggested by experience, to be applied to the reception and effect of circumstantial evidence.

The first is, that the several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred, and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue. Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof, and great care is to be taken in guarding against feigned and pretended circumstances, which may be designedly contrived and arranged so as to create or divert suspicion and prevent the discovery of the truth. These, by care and vigilance, may generally be detected, because things are so ordered by providence — events and their incidents are so combined and linked together — that real occurrences leave behind them vestiges by which, if carefully followed, the true character of the occurrences themselves may be discovered. A familiar instance is, where a person has been slain by the hands of others, and circumstances are so arranged as to make it appear that the deceased committed suicide. In a case recorded as having actually occurred, the print of a bloody hand was discovered on the deceased. On examination, however, it was the print of a left hand upon the left hand of the deceased. It being

impossible that this should have been occasioned by the deceased herself, the print proved the presence and agency of a third person, and excluded the supposition of suicide. So where a person was found dead, shot by a pistol ball, and a pistol belonging to himself was found in his hand, apparently just discharged, indicating death by suicide. Upon further examination, it appearing that the ball which caused the mortal wound was too large for that pistol, the conclusion was inevitable that suicide in the mode suggested must have been impossible.

The next rule to which I ask attention is that all the facts proved must be consistent with each other, and with the main fact sought to be proved. When a fact has occurred, with a series of circumstances preceding, accompanying and following it, we know that these must all have been once consistent with each other, otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail.

Of this character is the defense usually called an *alibi*; that is, that the accused was *elsewhere* at the time the offense is alleged to have been committed. If this is true, it being impossible that the accused should be in two places at the same time, it is a fact inconsistent with that sought to be proved, and excludes its possibility.

This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of

facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious, that all testimony, tending to show that the accused was in another place at the time of the offense, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence, whatever tends to support the one, tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies.

Another rule is, that the circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offense charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. The evidence must establish the *corpus delicti*, as it is termed, or the offense committed as charged; and, in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a

death by the act of any other person. This is to be proved beyond reasonable doubt.

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.

In every criminal prosecution, two things must concur; first, a good and sufficient indictment in which the criminal charge is set forth; and, secondly, such charge

must be established by the legal proof. The sufficiency of the indictment in substance and form is a matter of law, upon which, if drawn in question, it is the duty of the court to give an opinion. The general rule is, that no person shall be held to answer to a criminal charge, until the same is fully and plainly, substantially and formally, described to him. A good indictment, therefore, is necessary, independent of proof.

The indictment contains four counts, which are four different modes in which the homicide is alleged to have been committed.

To a person unskilled and unpracticed in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document. But it is often necessary; and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them may leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then, if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment.

Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and

a death by drowning, and perhaps a third, alleging a death by the joint result of both causes combined.

It may, perhaps, be supposed that, in the long and melancholy history of criminal jurisprudence, a precedent can be found for every possible mode in which a violent death can be caused; and it is safer to follow precedents. It is true that these precedents are numerous and various; but it is not true that, amidst new discoveries in art and science, and the powers of nature, new modes of causing death may not continually occur. The powers of ether and chloroform are of recent discovery. Suppose a person should be forcibly or clandestinely held, and those agents applied to his mouth till insensibility and death ensue. Though no such instance ever occurred before, the guilty agent could not escape.

Of course, I do not mean to intimate that these supposed agencies were used in the present instance, but allude to them simply by way of illustration. But, if such, or any similar new modes of occasioning death may have been adopted, they are clearly within the law. The rules and principles of the common law, just as when applied to steamboats and locomotives, though these have come into existence long since those principles were established, are broad and expansive enough to embrace all new cases as they arise. If, therefore, a homicide is committed by any mode of death, which, though practiced for the first time, falls within these principles, and it is charged in the indictment with as much precision and certainty as the circumstances of the case will allow, it comes within the scope of the law, and is punishable.

The principle is well stated in *East's Pleas of the Crown*, c. 5, § 13: "The manner of procuring the death of another with malice is, generally speaking, no otherwise material

than as the degree of cruelty or deliberation with which it is accompanied may in conscience enhance the guilt of the perpetrator; with this reservation, however, that malice must be of corporal damage to the party; and, therefore, working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, is not such a killing as the law takes notice of; but he who willfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense." This the author proceeds to illustrate by a number of remarkable and peculiar cases.

In looking at this indictment, we find that the first count, after the usual preamble, charges an assault and a mortal wound by stabbing with a knife; the second, by a blow on the head with a hammer; and the third, by striking, kicking, beating, and throwing on the ground.

The fourth and last count, which is somewhat new, it will be necessary to examine more particularly.

The court are all of opinion, after some consideration, that this is a good count in the indictment. From the necessity of the case, we think it must be so, because cases may be imagined where the death is proved, and even where remains of the deceased are discovered and identified, and yet they may afford no certain evidence of the form in which the death was occasioned; and then we think it is proper for the jury to say, that it is by means to them unknown.

We have already seen that a death occasioned by grief or terror cannot in law be deemed murder. Murder must be committed by an act applied to or affecting the person, either directly, as by inflicting a wound or laying poison;

or indirectly, as by exposing the person to a deadly agency or influence, from which death ensues. Here the count charges an assault upon the deceased (a technical term well understood in the law, implying force applied to or directed toward the person of another), in some way and manner, and by some means, instruments, and weapons, to the jury unknown; and that the defendant did thereby willfully and maliciously deprive him of life.

The rules of law require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and, if the circumstances will not permit a fuller and more precise statement of the mode in which the death is occasioned, this count conforms to the rules of law. I am therefore instructed by the court to say that, if you are satisfied, upon the evidence, that the defendant is guilty of the crime charged, this form of indictment is sufficient to sustain a conviction.

We now come to consider that ground of defense on the part of the defendant which has been denominated, not perhaps with precise legal accuracy, an *alibi*; that is, that the deceased was seen elsewhere out of the medical college after the time, when, by the theory of the proof on the part of the prosecution, he is supposed to have lost his life at the medical college. It is like the case of an *alibi* in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side, so as to control the conclusion, or at least render it doubtful, and thus lay the ground of an acquittal. And the court are of opinion that this proof is material; for, although the time alleged in the indictment is not material, and an act done at another time would sustain it, yet in point of evidence it may become material; and in the present

case, as all the circumstances shown on the other side, and relied upon as proof, tend to the conclusion that Dr. Parkman was last seen entering the medical college, and that he lost his life therein, if at all, the fact of his being seen elsewhere afterward would be so inconsistent with that allegation, that, if made out by satisfactory proof, we think it would be conclusive in favor of the defendant.

Both are affirmative facts; and the jury are to decide upon the weight of the evidence. When you are called upon to consider the proof of any particular fact, you will consider the evidence which sustains it in connection with that which makes the other way, and be governed by the weight of proof. Proof which would be quite sufficient to sustain a proposition, if it stood alone, may be encountered by such a mass of opposite proof as to be quite overbalanced by it.

In the ordinary case of an *alibi*, when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offense tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of the *alibi* does not outweigh the proof that he was at the place when the offense was committed, it is not sufficient.

There is one other point remaining, to which it is necessary to ask your attention; and that is, the evidence of character. There are cases of circumstantial evidence, where the testimony adduced for and against a prisoner is nearly balanced, in which a good character may be very important to a man's defense. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny or other lesser crime.

He may show that, notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known: and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience; it is so manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offenses, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect.

But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime like this of murder to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the

bad character of the defendant, unless he first opens that line of inquiry by evidence of good character.

In reference to the identification of persons or property much care should be observed, as it often happens that two persons, or two articles, may so closely resemble each other, that even those who deem it impossible to be mistaken may be in grievous error. In reference to the identity of persons, there is perhaps less liability to mistake, particularly if the person called to make the identification is an acquaintance; but when the identification is sought to be established by a witness who has never seen the prisoner but once or twice, the evidence should be rigidly scanned, and the benefit of every doubt given to the prisoner. So too in reference to property when there are no marks upon it, placed there by the person claiming to be the owner, and there is other property of the same class and the same marks, there is much liability to mistake, and while the evidence need not establish the identity to an *absolute certainty*, yet the proof should be such as to leave no reasonable doubt as to its identity, and the benefit of all doubt should be given to the prisoner. To illustrate the danger of trusting too fully to the evidence of witnesses upon matters of identification, the following cases are given, taken from Wills on Circumstantial Evidence, page 127, *et sequitur* :

REX v. CLINCH AND MACKLEY.

In *Rex v. Clinch and Mackley*, 3 P. & F. 144, the defendants were convicted before Mr. Justice Grose of a murder, and executed; and the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder; but several years afterward two men, who suffered for other

crimes, confessed at the scaffold the commission of the murder for which these persons were executed.

REX v. ROBINSON.

In *Rex v. Robinson*, Old Bailey Session Papers, 1824, the defendant was tried at the Old Bailey, July, 1824, on five indictments for different acts of theft. It appeared that a person resembling the prisoner in size and general appearance had called at various shops in the metropolis for the purpose of looking at books, jewelry, and other articles, with the pretended intention of making purchases, but made off with the property placed before him while the shopkeepers were engaged in looking out other articles. In each of these cases the prisoner was positively identified by several persons, while in the majority of them an *alibi* was clearly and positively established, and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the prisoner, and those persons deposed that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. He was convicted upon one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases expressed their conviction that the witnesses had been mistaken, and that the prosecutor had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which the conviction had taken place.

REX v. BOSWELL.

In *Rex v. Boswell*, 3 P. & F. 143, a respectable young man was tried for a highway robbery committed at Bethnal Green, in which neighborhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. A young woman, to whom the prisoner paid his addresses, gave evidence which proved a complete *alibi*. The prosecutor was then ordered out of court, and in the interval another young man, who awaited his trial on a capital charge, was introduced and placed by the side of the prisoner. The prosecutor was again put into the witness-box, and addressed by the prisoner's counsel thus: "Remember, the life of this young man depends upon your reply to the question I am about to put: Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head toward the dock, when, beholding two men so nearly alike, he dropped his hat, became speechless with astonishment for a time, and at length declined swearing to either. The prisoner was of course acquitted. The other young man was tried for another offense and executed, and before his death acknowledged that he had committed the robbery in question.

REX v. SAWYER.

In *Rex v. Sawyer*, Reading Assizes, upon a trial for burglary, where there was conflicting evidence as to the identity of the prisoner, Mr. Baron Bolland, after remarking upon the risk incurred in pronouncing on evidence of identity exposed to such doubt, said that when at the bar he had prosecuted a woman for child-stealing, tracing her

by eleven witnesses, buying ribbons and other articles at various places in London, and at last into a coach at Bishopsgate, whose evidence was contradicted by a host of other witnesses, and she was acquitted; and that he had afterward prosecuted the very woman who really stole the child, and traced her by thirteen witnesses. "These contradictions," said the learned judge, "make one tremble at the consequences of relying on evidence of this nature, unsupported by other proof."

As incidental to the establishment of identity, the quantity of light necessary to enable a witness to form a satisfactory opinion has occasionally become the subject of discussion.

REX *v.* HAINES.

In *Rex v. Haines*, 3 P. & F. 144, the defendant was tried in January, 1799, for shooting at three Bow street officers, who, in consequence of several robberies having been committed near Hounslow, were employed to scour that neighborhood. They were attacked in a post-chaise by two persons on horseback, one of whom stationed himself at the head of the horses, and the other went to the side of the chaise. One of the officers stated that the night was dark, but that from the flash of the pistols he could distinctly see that one of the robbers rode a dark brown horse, between thirteen and fourteen hands high, of a very remarkable shape, having a square head and thick shoulders; that he could select him out of fifty horses, and had seen him since at a stable in Long Acre; and that he also perceived that the person at the side glass had on a rough shag greatcoat.

REX v. BROOK.

In *Rex v. Brook*, 31 St. Tr. 1135, which was a case of burglary before the special commission at York, January, 1813, a witness stated that a man came into his room in the night, and caused a light by striking on the stone floor with something like a sword, which produced a flash near his face, and enabled him to observe that his forehead and cheeks were blacked over in streaks, that he had on a dark-colored top-coat, and a dark-colored handkerchief, and was a large man, from which circumstances, and from his voice, he believed the prisoner to be the same man.

At the Spring Assizes, at Bury St. Edmunds, 1830, a respectable farmer, occupying twelve hundred acres of land, was tried for a burglary and stealing a variety of articles. Amongst the articles alleged to have been stolen were a pair of sheets and a cask, which were found in the possession of the prisoner, and were positively sworn to by the witnesses for the prosecution to be those which had been stolen. The sheets were identified by a particular stain, and the cask by the mark "P. C. 84," inclosed in a circle at one end of it. On the other hand, a number of witnesses swore to the sheets being the prisoner's, by the same mark by which they had been identified by the witnesses on the other side as being the prosecutor's. With respect to the cask, it was proved by numerous witnesses, whose respectability left no doubt of the truth of their testimony, that the prisoner was in the habit of using cranberries in his establishment, and that they came in casks, of which the cask in question was one. In addition to this, it was proved that the prisoner purchased his cranberries from a tradesman

in Norwich, whose casks were all marked "P. C. 84," inclosed in a circle, precisely as the prisoner's were, the letters P. C. being the initials of his name, and that the cask in question was one of them. In summing up, the learned judge remarked that this was one of the most extraordinary cases ever tried, and that it certainly appeared that the witnesses for the prosecution were mistaken. The prisoner was acquitted.

A man was tried in Scotland for housebreaking and theft. The girl whose chest had been broken open, and whose clothes had been carried off, swore to the only article found in the prisoner's possession, and produced, namely, a white gown, as being her property. She had previously described the color, quality and fashion of the gown, and they all seemed to correspond with the article produced. The housebreaking being clearly proved, and the goods, as it was thought, clearly traced, the case was about to be closed by the prosecutor, when it occurred to one of the jury to cause the girl to put on the gown. To the surprise of every one present, it turned out that the gown which the girl had sworn to as belonging to her, which corresponded with her description, and which she said she had worn only a short time before, would not fit her person. She then examined it more minutely, and at length said it was not her gown, though almost in every respect resembling it. The prisoner was, of course, acquitted; and it turned out that the gown produced belonged to another woman, whose house had been broken into about the same period, by the same person, but of which no evidence had at that time been produced.

On the trial of a young woman for child-murder, it appeared that the body of a newly-born female child was found in a pond about a hundred yards from her master's house, dressed in a shirt and cap, and a female witness deposed that the stay or tie which was pinned to the cap and made of spotted linen, was made of the same stuff as a cap found in the prisoner's box; but a mercer declared that the two pieces were not only unlike in pattern, but different in quality.

A youth was convicted of stealing a pocket-book containing five one-pound notes, under very extraordinary circumstances. The prosecutrix left home to go to market in a neighboring town, and having stooped down to look at some vegetables exposed to sale, she felt a hand resting upon her shoulder, which, on rising up, she found to be the prisoner's. Having afterward purchased some articles at a grocer's shop, on searching for her pocket-book in order to pay for them, she found it gone. Her suspicion fell upon the prisoner, who was apprehended, and upon his person was found a black pocket-book, which she identified by a particular mark, as that which she had lost, but it contained no money. Several witnesses deposed that the prisoner had long possessed the identical pocket-book, speaking also to particular marks by which they were enabled to identify it; but some discrepancies in their evidence having led to the suspicion that the defense was a fabricated one, the jury returned a verdict of guilty, and the prisoner was sentenced to be transported. During the continuance of the assizes, two men who were mowing a field of oats through which the path lay by which the prosecutrix had gone to market, found in the oats, close to the path, a black pocket-book containing

five one-pound notes. The men took the notes and pocket-book to the prosecutrix, who immediately recognized them; and the committing magistrate dispatched a messenger with the articles found, and her affidavit of identity, to the judge at the assize town, who directed the prisoner to be placed at the bar, publicly stated the circumstances so singularly brought to light, and directed his immediate discharge. The prosecutrix must have dropped her pocket-book, or drawn it from her pocket with her handkerchief, and had clearly been mistaken as to the identity of the pocket-book produced upon the trial.

It is not, however, necessary that the identity of stolen property should be invariably established by positive evidence. In many such cases identification is impracticable; and yet the circumstances may render it impossible to doubt the identity of the property, or to account for the possession of it by the party accused upon any reasonable hypothesis consistent with his innocence; as in the case of laborers employed in docks, warehouses, or other such establishments, found in possession of tea, sugar, tobacco, pepper, or other like articles, concealed about the person, in which cases the similarity or general resemblance of the article stolen is sufficient. Two men were convicted of stealing a quantity of soap from a soap manufactory near Glasgow, which was broken into on a Saturday night by boring a hole in the wall, and 120 pounds of yellow soap abstracted. On the same night, at eleven o'clock, the prisoners were met by a watchman near the center of the city, one of them having 40 pounds of yellow soap on his back, and the other with his clothes greased all over with the same substance.

The prisoners, on seeing the watchman, attempted to escape, but were seized. The owner declared that the soap was exactly of the same kind, size, and shape, with that abstracted from his manufactory; but, as it had no private mark, he could not identify it more distinctly. One of the prisoners had formerly been a servant about the premises, and both of them alleged that they got the soap in a public-house, from a man whom they did not know.

A servant-man was seen to come from a part of his master's premises where he had no right to go, and where a large quantity of pepper was stored in bulk, and on being stopped, a quantity of pepper of the same kind was found on his person; it was held by the criminal court of appeal that though the pepper could not be positively identified, he had been properly convicted of larceny.

In cases of prosecution for murder, by poisoning, the evidence must nearly always be entirely circumstantial, and, however strongly circumstances may point to the prisoner as having administered it with a criminal intent, yet, unless every link in the chain of evidence is full and complete, a conviction ought not to be had. It should be shown that the prisoner not only had the poison which produced the death, but that he also had the *opportunity* to administer it, and that there was a *motive* for desiring the prisoner's death. The two first propositions must be fully established, and if there is a failure to establish either, no conviction can be had, unless it is shown that the prisoner alone had the opportunity to administer it, and that the deceased had no opportunity to take it for the purpose of committing suicide. As to

the *motive* that may be inferred from circumstances, and, while a conviction may be had without proof of an actual motive, if the other evidence is complete, yet, if there is any doubt from the other proof, the failure to show a motive should be regarded as sufficient to secure the prisoner's acquittal .

REGINA V. GRAHAM.

In *Regina v. Graham*, Carlisle Summer Assizes, 1845, cited by Mr. Wills, page 219, the prisoner was indicted for the murder of his wife, who was taken ill on the morning of the 25th of November, and died two days afterward, with symptoms resembling those of an irritant poison. Poisoning not having been suspected, the body was interred without examination; but suspicions having afterward arisen, it was exhumed in the month of June following, and a large quantity of arsenic was discovered in the stomach. Several weeks after the apprehension of the prisoner, the police took possession of some of his garments, which were found hanging up in his lodgings, in the pockets of which arsenic was found. In his address to the jury, Mr. Baron Rolfe said, "Had the prisoner the opportunity of administering poison? that was one thing. Had he any motive to do so? that was another. There was also another question, which was most important: it was, whether the party who had the opportunity of administering poison had poison to administer? If he had not the poison, the having the opportunity became unimportant. If he had the poison, then another question arose, did he get it under circumstances to show that it was for a guilty or improper object? The evidence by which it was attempted to trace poison to the possession of the pris-

oner was, that on a certain occasion, after the death of the wife, and after he himself was apprehended, the contents of the pockets of a coat, waistcoat, and trousers; on being tested by the medical witnesses, were found to contain arsenic; and that, a week afterward, another waistcoat which came into the possession of the policeman, on being examined, was also found to contain arsenic. Did that bring home to the prisoner the fact that he had arsenic in his possession in November? It was not conclusive that, because he had it in June, he had it in November. He (the learned judge) inferred from what had been stated by the medical men, that the quantity of arsenic found in the pockets of the clothes was very small. Now, if he had it in a larger quantity in November, and it had been used for some purpose, being a mineral substance, such particles were likely to remain in the pockets, and finding it there in June was certainly evidence that it might have been there in larger quantity in November; but, obviously, by no means conclusive, as it might have been put in afterward. But connected with the arsenic being found in the clothes, there were other considerations which he thought were worthy to be attended to. The prisoner was apprehended on the 9th of June, and he knew long before that time that an inquiry was going on. He was taken up, not in the clothes in which the arsenic was found; and a fortnight afterward a batch of clothes was given up in which arsenic was detected. Now, if arsenic had been found in the clothes he was wearing, it would be perfectly certain, in the ordinary sense, that he had arsenic in his possession. But it was going a step further to say that because arsenic was discovered in clothes of his, accessible to so many people between the time of his apprehension and their

being given up, it was there when he was apprehended ; in all probability, he thought it was, but that was by no means the necessary consequence. That observation was entitled to still more weight, with regard to the waist-coat last given up to the police, because it was not given up till three weeks after the prisoner was apprehended, and had been hanging in the kitchen, accessible to a variety of persons. . . . It was urged also that arsenic was used for cattle. It might be so, and it might be that the prisoner might innocently have had arsenic. The circumstance of there being arsenic in so many pockets ought not to be lost sight of, for it could scarcely be conceived that a guilty person should be so utterly reckless as to put the poison he used into every pocket he had. One would have thought that he would have kept it concealed, or put it only in some safe place for the immediate purpose of being used ; and it was worthy of observation that it did not appear to have been put into the clothes in such a way as it would have been put had the prisoner been desirous to conceal it." The prisoner was acquitted.

REGINA v. MADELINE SMITH.

In *Regina v. Madeline Smith*, before the High Court of Justiciary at Edinburgh in 1857, and reported by A. F. Irvine, advocate, a question whether or not the prisoner had the opportunity of administering arsenic to the deceased was the turning point of the case. The prisoner, a young girl of nineteen, was tried upon an indictment charging her, in accordance with the law of Scotland, with the administration to the same person, of arsenic, with intent to murder, on two several occasions in the month of February, and with his murder by the

same means, on the 22d of March following. She had returned home from a boarding-school in 1853, and in the following year formed a clandestine connection with a foreigner of inferior position, named L'Angelier, whose addresses had been forbidden by her parents, which, early in 1856, became of a criminal character, as was shown by her letters. In the month of December following, another suitor appeared, whose addresses were accepted by her with the consent of her parents, and arrangements were made for their marriage in June. During the earlier part of this engagement, the prisoner kept up her interviews and correspondence with L'Angelier; but the correspondence gradually became cooler, and she expressed to him her determination to break off the connection, and implored him to return her letters; but this he refused to do, and declared that she should marry no other person while he lived. After the failure of her efforts to obtain the return of her letters, she resumed in her correspondence her former tone of passionate affection, assuring him that she would marry him and no one else, and denying that there was any truth in the rumors of her connection with another. She appointed a meeting on the night of the 19th of February, at her father's house, where she was in the habit of receiving his visits, after the family had retired to rest, telling him that she wished to have back her "cool letters," apparently with the intention of inducing him to believe that she remained constant in her attachment to him. In the middle of the night after that interview, at which he had taken coffee prepared by the prisoner, L'Angelier was seized with alarming illness, the symptoms of which were similar to those of poisoning by arsenic. There was no evidence that the prisoner pos-

sessed arsenic at that time, but on the 21st she purchased a large quantity, professedly for the purpose of poisoning rats, an excuse for which there was no pretense. On the night of the 22d, L'Angelier again visited the prisoner, and about eleven o'clock on the following day was seized with the same alarming symptoms as before, and on this occasion also he had taken cocoa from the hands of the prisoner. After this attack L'Angelier continued extremely ill, and was advised to go from home for the recovery of his health.

On the 6th of March the prisoner a second time bought arsenic, and on the same day she went with her family to the Bridge of Allan (where she was visited by her accepted lover), and remained till the 17th, when they returned to Glasgow. On the day before her departure for the Bridge of Allan, L'Angelier wrote a letter to her, in which he reproached her for the manner in which she had evaded answering the questions which he had put to her in a former letter respecting her rumored engagement with another person, expressed his conviction that there was foundation for the report, and after repeating his inquiries, threatened, if she again evaded them, to try some other means of coming at the truth. To this letter the prisoner, although she had been engaged nearly two months, and was receiving the visits of her affianced at the Bridge of Allan, from which place she wrote, replied that there was no foundation for the report, and that she would answer all his questions when they met, and informed him of her expected return to Glasgow on the 17th of March. L'Angelier, pursuant to medical advice, on the 10th of March went to Edinburgh, leaving directions for the transmission of his letters, and having become much better, left that place on the 19th for the

Bridge of Allan. During this interval, namely, on the 17th, he returned to his lodgings at Glasgow, and inquired anxiously of his landlady if there was no letter waiting for him; as the prisoner's family were to be at home on that day, and she was to write to fix another interview. He left Glasgow again on Thursday, the 19th, for the Bridge of Allen, leaving directions as before for the transmission to him of any letter which might come for him during his absence. On the 18th of March the prisoner a third time purchased a large quantity of arsenic, alleging, as before, that it was for the purpose of killing rats. A letter from the prisoner to L'Angelier came to his lodgings on Saturday, the 21st, from the date and contents of which it appeared that she had written a letter appointing to see him on the 19th. He had not, however, received it in time to enable him to keep her appointment. In that letter she urged him to come to see her, and added, "I waited and waited for you, but you came not. I shall wait again to-morrow night, same time and arrangement." This letter was immediately transmitted to L'Angelier, and in consequence he returned to his lodgings at Glasgow about eight o'clock on the evening of Sunday, the 22d, in high spirits and improved health, having traveled a considerable distance by railway, and walked fifteen miles. He left his lodgings about nine o'clock, and was seen going leisurely in the direction of the prisoner's house, and about twenty minutes past nine he called at the house of an acquaintance who lived about four or five minutes' walk from the prisoner's residence. After leaving his friend's house, all trace of him was lost, until two o'clock in the morning, when he was found at the door of his lodgings, unable to open the latch, doubled up and speechless from pain and exhaustion,

and about eleven o'clock the same morning he died, from the effects of arsenic, of which an enormous quantity was found in his body. The prisoner stated in her declaration that she had been in the habit of using arsenic as a cosmetic, and denied that she had seen the deceased on that eventful night; whether she had done so or not was the all-momentous question. As there was no evidence that the prisoner possessed poison at the time of the first illness, nor any analysis made of the matter ejected on either the first or second illness, the learned Lord Justice Clerk Cockburn said that there was no proof of the administration of poison on either of those occasions; that the first charge, therefore, had entirely failed, and that it was safer not to hold that the second illness was caused by poison. As to the principal charge of murder, his lordship said, "Supposing the jury were quite satisfied that the prisoner's letter brought L'Angelier again into Glasgow, were they in a situation to say, with satisfaction to their consciences, that as an inevitable and just result from this, they could find it proved that the prisoner and deceased had met that night? that was the point in the case. But it is for you to say here, whether it has been proved that L'Angelier was in the house that night. If you can hold that, that link in the chain is supplied by just and satisfactory inference—remember that I say, just and satisfactory,—and it is for you to say whether the inference is satisfactory and just, in order to complete the proof, if you really feel that you may have the strongest suspicion that he saw her, for really no one need hesitate to say that, as a matter of moral opinion, the whole probabilities of the case are in favor of it, but if that is all the amount that you can derive from the evidence, the link still remains wanting in the chain;

the catastrophe and the alleged cause of it are not found linked together. And, therefore, you must be satisfied that you can here stand and rely upon the firm foundation, I say, of a just and sound, and perhaps I may add, inevitable inference. That a jury is entitled often to draw such an inference there is no doubt. If you find this to be a satisfactory and just inference, I cannot tell you that you are not at liberty to act upon it, because most of the matters occurring in life must depend upon circumstantial evidence, and upon the inferences which a jury may feel bound to draw. But it is an inference of a very serious character; it is an inference upon which the death of this party by the hand of the prisoner really must depend. And then, you will take all the other circumstances of the case into your consideration, and see whether you can infer from them that they met. If you think they met together that night, and he was seized and taken ill, and died of arsenic, the symptoms beginning shortly after the time he left her, it will be for you to say, whether in that case there is any doubt as to whose hand administered the poison." In another part of his charge the learned judge said: "In the ordinary matters of life, when you find the man came to town for the purpose of getting a meeting, you may come to the conclusion that they did meet; but observe that becomes a very serious inference indeed to draw in a case where you are led to suppose that there was an administration of poison and death resulting therefrom. It may be a very natural inference, looking at the thing morally. None of you can doubt that she waited for him again; and if she waited a second night, after her first letter, it was not surprising that she should look out for an interview on the second night, after the second letter. . . .

She says, 'I shall wait again to-morrow night, same hour and arrangement.' And I say there is no doubt, but it is a matter for the jury to consider, that after writing this letter, he might expect she would wait another night—that is the observation I made—and, therefore, it was very natural that he should go to see her that Sunday night.

"But, as I said to you, this is an inference only. If you think it such a just and satisfactory inference that you can rest your verdict upon it, it is quite competent for you to draw such an inference from such letters as these, and from the conduct of the man coming to Glasgow for the purpose of seeing her, for it is plain that that was his object in coming to Glasgow. It is sufficiently proved that he went out immediately after he got some tea and toast, and had changed his coat. But then, gentlemen, in drawing an inference, you must always look to the important character of the inference which you are asked to draw. If this had been an appointment about business, and you found that a man came to Glasgow for the purpose of seeing another upon business, and that he went out for that purpose, having no other object in coming to Glasgow, you would probably scout the notion of the person whom he had gone to meet saying I never saw or heard of him that day; but the inference which you are asked to draw is this, namely, that they met upon that night, where the fact of their meeting is the foundation of a charge of murder. You must feel, therefore, that the drawing of an inference in the ordinary matters of civil business, or in the actual intercourse of mutual friends, is one thing, and the inference from the fact that he came to Glasgow, that they did meet, and that, therefore, the poison was adminis-

tered to him by her at that time, is another, and a most enormous jump in the category of inferences. Now, the question for you to put to yourselves is this: Can you now, with satisfaction to your own minds, come to the conclusion that they did meet on that occasion, the result being, and the object in coming to that conclusion being, to fix down upon her the administration of the arsenic by which he died?

“She has arsenic before the 22^d, and that is a dreadful fact, if you are quite satisfied that she did not get it and use it for the purpose of washing her hands and face. It may create the greatest reluctance in your mind, to take any other view of the matter than that she was guilty of administering it somehow, though the place where, may not be made out, or the precise time of the interview. But, on the other hand, you must keep in view that arsenic could only be administered by her if an interview took place with L’Angelier; and that interview, though it may be the result of an inference that may satisfy you *morally* that it did take place, still rests upon an inference alone; and that inference is to be the ground, and must be the ground, on which a verdict of guilty is to rest. Gentlemen, you will see, therefore, the necessity of great caution and jealousy in dealing with any inference which you may draw from this. You may be perfectly satisfied that L’Angelier did not commit suicide; and of course it is necessary for you to be satisfied of that, before you could find that anybody administered arsenic to him. Probably none of you will think for a moment that he went out that night, and that, without seeing her, and without knowing what she wanted to see him about, if they had met, he swallowed above 200 grains of arsenic in the street, and that he was carrying it about with him.

Probably you will discard that altogether . . . yet, on the other hand, gentlemen, keep in view that that will not of itself establish that the prisoner administered it. The matter may remain most mysterious, wholly unexplained; you may not be able to account for it on any other supposition; but still that supposition or inference may not be a ground on which you can safely and satisfactorily rest your verdict against the panel. Now, then, gentlemen, I leave you to consider the case with reference to the views that are raised upon this correspondence. I don't think you will consider it so unlikely as was supposed that this girl, after writing such letters, may have been capable of cherishing such a purpose. But still, although you may take such a view of her character, it is but a supposition that she cherished this murderous purpose—the last conclusion, of course, that you ought to come to, merely on supposition, and inference, and observation, upon this varying and wavering correspondence of a girl in the circumstances in which she was placed. It receives more importance, no doubt, when you find the purchase of arsenic just before she expected, or just at the time she expected, L'Angelier. But still these are but suppositions; they are but suspicions.

“I don't say that inferences may not competently be drawn; but I have already warned you as to inferences which may be drawn in the ordinary matters of civil life, and those which may be drawn in such a case as this; and, therefore, if you cannot say, We find here satisfactory evidence of this meeting, and that the poison must have been administered by her at a meeting, whatever may be your suspicion, however heavy the weight and load of suspicion is against her, and however you may have to struggle to get rid of it, you perform the best

and bounden duty as a jury, to separate suspicion from truth, and to proceed upon nothing that you do not find established in evidence against her." The jury returned, in conformity with the law of Scotland, a verdict of not guilty on the first, and of not proven on the second and third charges.

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